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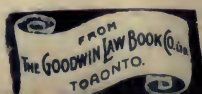
STUDENTS' MANUAL OF THE LAW OF WILLS

H. N. ROBERTS.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A MANUAL

OF

THE LAW OF WILLS,

(For the Use of Students)

BY

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PREFACE.

This work is founded principally on Mr. Hawkins' Treatise on the Construction of Wills, the arrangement and language of which has been to a great extent followed. Reference has also been made to Jarman on Wills, 4th edition; Theobald on Wills, 3rd edition; Walkem on Wills, and Williams on Executors, 8th edition. It is only intended as a guide-book for the use of students, to whom I venture to hope it may prove useful, especially in preparing for their examinations.

H. N. R.

Toronto, 1892.

A MANUAL

OF

THE LAW OF WILLS.

CHAPTER I.

BY WHAT LOCAL LAW WILLS ARE REGULATED.

The possession of property in one country, by persons domiciled in another, is now so general that the enquiry by what local law a testamentary disposition of such property must be governed is of the highest importance.

A will, so far as it relates to immovable property (which term includes leaseholds), must be made in accordance with the formalities required by the law of the land where the immovable property is situated. (Theobald, 3rd ed., 1; 1 Jarm, 4th ed., 1; Walkem, 7.)

As regards personal property, the law of the testator's domicile, at the time of making his will

and of his death, if there is no intermediate change, must govern the form of the will, and the solemnities of its execution; so that if a testator be domiciled in a foreign country, and own personal estate in Ontario, a will executed according to the law of the country in which he is domiciled at the time of his death would be recognized in Ontario as a valid disposition of such property. (Walkem, 5; Theobald, 3rd ed., 3; 1 Jarm, 4th ed., 2.)

Wills of personality made in execution of powers are valid, if made in accordance with the instrument creating the power without reference to the domicile of the testator, subject to Section 13 of *The Wills Act of Ontario*, which enacts, that, "no appointment made by will, unless the same is executed in manner hereinbefore required, (Sec. 12;) and every will executed in manner hereinbefore required, shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it has been expressly required that a will made in exercise of such power shall be executed with some additional or other form of execution or solemnity." (*R. S. O*, 1887, c. 109, s. 13.)

E.g.—A will executed according to *The Wills Act of Ontario* is a good execution of a power, though

the will would be invalid according to the testator's domicile. (Theobald, 3rd ed., 1.)

The reader is referred to Theobald on Wills 3rd ed., ch. I., and to Jarman on Wills, 4th ed., ch. I., where the question as to domicile is fully treated.

CHAPTER II.

FORM AND CHARACTERISTICS OF A WILL.

A *will* may be defined as a right given to the proprietor of continuing his property after his death in such persons as he shall name. (2. Bl. Com. 490.)

Any instrument executed in the manner required by *The Wills Act of Ontario* may take effect as a will, provided it was the intention of the donor that it should not operate till after his death. (Theobald, 3rd ed., 10.)

It is characteristic of a will that it is *in its own nature* ambulatory and revocable during the life of the testator, even though it should in terms be made irrevocable. (*Theobald*, 3rd ed., 11; 1 Jarm, 4th ed., 16.)

A *codicil* is a supplement to a will, or an addition, made by the testator, and annexed to, and to be taken as part of the testament: being for its explanation, or alteration, or to make some addition to, or else some sub-

traction from the former dispositions of the testator. (Wms. Exs., 8th ed., 8.)

A will is in its nature different from a deed, and though executed with the formalities of a deed, it cannot operate as such. (Walkem, 13.)

But a deed not intended *to have any effect till the settlor's death* is testamentary. (Theobald, 3rd ed., 9.)

And an instrument coming into operation immediately, and of which no part is revocable, more especially if it involves anything in the nature of consideration, cannot take effect as a will. (Ib.)

CHAPTER III.

TESTAMENTARY CAPACITY.

Every person of sound mind and not under some special disability may make a will. (Theobald, 3rd ed., 14.)

No will made by any person under the age of twenty-one years shall be valid. (*R. S. O.* 1887, c. 109. s. 11.)

It may be here remarked, that in computing the age of a person for testamentary or other purposes, the day of his birth is included; thus, if he were born on the 16th of January, 1800, he would have attained his majority on the 15th of January, 1821; and as the law does not recognize fractions of a day, the age would be attained on the first instant of the latter day. (1 Jarm, 4th ed., 45.)

A married woman may, since 1884, dispose by will, of any real or personal property as her separate property, in the same manner as if she were a *femme sole*, without the intervention of any trustee. (*R. S. O.* 1887. c. 132, s. 3).

A testator must, at the time of making his will, have an understanding of the nature of the business in which he is engaged, a recollection of the property he means to dispose of, of the persons who have a claim to be the objects of his bounty, and the manner in which it is to be distributed. (Theobald, 3rd ed., 13.)

Idiots.—Idiots are absolutely disabled from disposing of their property by will. (1 Jarm, 4th ed., 34.)

An idiot is a person who has not any use of reason; has no understanding as to his age; who is his father or mother; what shall be for his profit or loss.

Lunacy, Insanity.—These expressions are most commonly applied to the state that persons of unsound minds, who are not idiots or imbeciles, are in. (Walkem, 54, 55.)

It has been laid down that the test of a person being of unsound mind, in a legal sense, is the existence of a *delusion* or a *belief in* facts which an ordinary person would not credit, or a belief which one cannot understand how any person in his senses should hold. (1 Jarm, 4th ed., 36.)

Testamentary incapacity is the necessary consequence of an unsound mind. (Ib, 37.)

Where a testator is subject to delusions with regard

to persons who would be the natural objects of his testamentary bounty, his will made while he is under the influence of such delusions is invalid. (Theobald, 3rd ed., 13.)

But where a testator is subject to delusions which leave the general power of understanding unaffected, and are wholly unconnected with his testamentary dispositions, such delusions do not affect his capacity to make a will. (Ib.)

A will made by a testator after he has been insane must be shown to have been made after his recovery or in a lucid interval. (Ib.)

It appears that only a mind that comprehends the testamentary act is required. (1 Jarm, 4th ed. 37.)

Mental imbecility arising from advanced age, or produced permanently or temporarily by excessive drinking, or any other cause, may destroy testamentary power. (1 Jarm, 4th ed., 34.)

An alien may dispose of real or personal property by will. (*R. S. C.*, c. 113, s. 3.)

A convict may dispose of his property by will. (Theobald, 3rd ed., 18.)

CHAPTER IV.

REQUISITES FOR A VALID WILL.

No will can be valid of which the testator does not known and approve the contents. (Theobald, 3rd ed., 19.

Undue Influence.—Undue influence is a species of fraud, and a will procured by such means will not be allowed to stand. (Walkem, 138.)

To establish a case of undue influence, it must be shown that fraud or coercion has been practised on the testator *in relation to the will itself*, not merely in relation to other matters or transactions. (Theobald, 3rd ed., 20.)

But persons standing in a fiduciary relation to the testator may lawfully exert their influence to obtain a will or legacy, so long as the testator knows what he is doing and is a free agent; and the burden of proof of undue influence lies upon those who assert it. (*Walker* v. *Smith*, 29 Bea. 394; Theobald, 3rd ed., 19; Walkem, 138.)

The distinction may here be noticed between the

rules applicable in the case of gifts *inter vivos* to persons standing in a fiduciary relation to the donor, and those applicable to gifts by will. In the former case, it lies upon the donee to show not only that the donor intended to give, but that he was in no way influenced by the donee. (Pollock, Con., 5th ed., 582, 583.)

Fraud.—A will procured by fraud may be annulled, but it is left to the discretion of the Court to say what deceit shall annul a will, and in order to discern whether it may be such as may overthrow the will or not, the deceit practised is compared with the capacity or understanding of the person deceived. (Walkem, 134.)

Strong evidence is required to show that a duly executed will is not the act of the testator, and that he was not aware of its provisions. (Ib. 136.)

Fraud to vitiate a will must be contemporaneous with the making of the will, and must be discovered in and be a part of the *res gestae.* (Ib.)

Execution, Attestation.—Section 12 (1) of *The Wills Act of Ontario* enacts that "no will shall be valid unless it is in writing, and executed in manner hereinafter mentioned; that is to say, it shall be *signed at the foot or end* thereof *by the testator or by some other*

person in his presence, and by his direction; and such signature shall be *made or acknowledged* by the testator, *in the presence* of two or more witnesses *present at the same time*, and such witnesses, shall attest and shall subscribe the will *in the presence of* the testator; but no form of attestation shall be necessary." (*R.S.O.* 1887, c. 109, s. 12 (1).)

The signature of the testator must be intended as an execution of the will. (Theobald, 3rd ed., 21.)

As regards the position of the testator's signature, it is enacted, that "every will, so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, shall be deemed to be valid, within the meaning of this Act, if the signature is so placed, at, or after, or following, or under, or beside, or opposite to the end of the will, that it is apparent on the face of the will that the testator intended to give effect by such signature to the writing signed as his will; and no such will shall be affected by the circumstance that the signature does not follow or is not immediately after the foot or end of the will, or by the circumstance that a blank space intervenes between the concluding word of the will and the signature, or by the circumstance that the signature is placed among the words of the

testimonium clause, or of the clause of attestation, or follows or is after or under the clause of attestation either with or without a blank space intervening, or follows, or is after, or under, or beside the names or one of the names of the subscribing witnesses, or by the circumstance that the signature is on a side, or page, or other portion of the paper or papers containing the will, whereon no clause or paragraph or disposing part of the will is written above the signature, or by the circumstance that there appears to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature; and the enumeration of the above circumstances shall not restrict the generality of the above enactment; but no signature under this Act shall be operative to give effect to any disposition or direction which is underneath, or which follows it, nor shall it give effect to any disposition or direction inserted after the signature was made. (*R. S. O.* 1887, c. 109 s., 12[2].)

The signature of the testator must be written or acknowledged by the testator in the presence of both the witnesses together, before either of them attest and subscribe the will. (Theobald, 3rd ed., 24.)

It is not necessary for the testator to declare that

the paper, which he has requested the witnesses to sign, is his will; nor is it necessary for him to acknowledge his signature as such, when he has *requested* the witnesses to sign a paper not declared to be a will, so long as they have seen his signature. (Theobald 3rd ed., 25.)

But a mere request to witnesses to attest an instrument the nature of which is not explained to them, and the signature to which they do not see, is not sufficient. (Ib. 26.)

When the will is signed by some other person by the testator's direction, the witnesses must be present when the testator directs the signature to be made, they must see the signature written, the signature must be acknowledged by the testator in their presence, and the will must be acknowledged as a will. (Ib.)

The witnesses must subscribe in the presence of the testator, but they need not subscribe in the presence of each other. (Ib.)

The Wills Act of Ontario (*R. S. O.* 1887, c. 109), s. 16 provides that if any person who shall attest the execution of a will shall, at the time of the execution thereof, or at any time afterwards, be incompetent to be admitted a witness to prove the execution thereof, such will shall not, on that account, be invalid.

Section 17 enacts in effect that a will attested by a beneficiary under the will is valid, though the gift to the attesting witness is void.

Section 18 enacts that "in case by any will any real or personal estate is charged with any debt or debts, and any creditor, or the wife or husband of any creditor whose debt is so charged attests the execution of such will, such creditor, notwithstanding such charge, shall be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof."

Section 19 enacts that "no person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof."

CHAPTER V.

ALTERATIONS, INTERLINEATIONS, AND OBLITERATIONS.

Section 23 of *The Wills Act of Ontario* (*R.S.O.*, 1887, c. 109) enacts that "no obliteration, interlineation or other alteration made in any will after the execution thereof, shall be valid or have any effect, except so far as the words or effect of the will before such alteration are not apparent, unless such alteration is executed in like manner as hereinbefore is required for the execution of the will, but the will, with such alteration as part thereof, shall be deemed to be duly executed, if the signature of the testator and the subscription of the witnesses are made in the margin or in some other part of the will opposite or near to such alteration, or at the foot or end of, or opposite to, a memorandum referring to such alteration, and written at the end or in some other part of the will."

An alteration opposite which the testator and two witnesses have set their initials in the margin is sufficiently executed under this section. (Theobald, 3rd ed., 30.)

CHAPTER VI.

REVOCATION OF WILLS.

Section 20 of *The Wills Act of Ontario* enacts that "every will shall be revoked by the marriage of the testator, *except* a will made in the exercise of a power of appointment where the real or personal estate thereby appointed would not, in default of such appointment, pass to the testator's heir, executor, or administrator, or the person entitled as the testator's next of kin under *The Statute of Distributions.*"

A will though made in contemplation of marriage, is revoked by marriage. (Theobald, 3rd ed., 32.)

A will made in exercise of a power is not revoked by marriage where the heir, executor, or administrator, or *statutory* next of kin, would not in all events take in default of appointment. (Ib.)

And a will made in exercise of a power is not revoked by marriage if the persons taking in default of appointment, do not take, under the instrument creating the power, as *statutory* next of kin. (Ib.; and see ch. xix. for the difference between "next of kin

according to *The Statute of Distribution*" and "next of kin" simply.)

And by section 21 of *The Wills Act of Ontario*, it is enacted that "no will shall be revoked by any presumption of an intention, on the ground of an alteration in circumstances."

Section 22 enacts that "no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing or otherwise destroying the same, by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

Revocation must be made while the testator is of sound mind. The act of revocation must be done *animo revocandi*. (Theobald, 3rd ed., 33.)

The description of a testamentary document as the last will of the testator will not alone have the effect of revoking prior testamentary papers; (Theobald, 3rd, ed., 38), but it seems that he must declare therein that he thereby revokes all former wills, etc.

In order to revoke a will it is absolutely necessary that the testator should adopt one or other of the modes of revocation pointed out in section 22.

CHAPTER VII.

REVIVAL OF WILLS.

The Wills Act of Ontario (*R. S O.* 1887, c. 109.), section 24, enacts, that "no will or codicil, or any part thereof, which has been in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same; and where any will or codicil which has been partly revoked, and afterwards wholly revoked, is revived, such revival shall not extend to so much thereof as was revoked before the revocation of the whole thereof, unless an intention to the contrary is is shown."

The revocation of a will revoking a former will does not revive the former will. (Theobald, 3rd ed., 53.)

A will which has been destroyed and no longer exists in writing cannot be revived by a codicil, though there may be a draft of the will in existence. (Ib., 55.)

A codicil making an alteration in a will, and confirming it in all other respects, does not revive the will so far as it has been altered by intermediate codicils. (*Crosbie* v. *Macdonald*, 4 Ves; 610; *Green* v. *Tribe*, 9 Ch. D. 231.)

CHAPTER VIII.

WHAT PROPERTY MAY BE DISPOSED OF BY WILL.

By virtue of the 10th section of *The Wills Act of Ontario,* "every person may devise, bequeath, or dispose of by will executed in manner hereinafter mentioned, all real estate and personal estate to which he may be entitled, at the time of his death, and which if not so devised, bequeathed, or disposed of, would devolve upon his heir-at-law, or upon his executor or administrator; and the power hereby given shall extend to estates *pur autre vie*, whether there be or be not any special occupant thereof, and whether the same be a corporeal or an incorporeal hereditament; and also to all contingent, executory, or other future interests in any real or personal estate, whether the testator be or be not ascertained as the person or one of the persons in whom the same may respectively become vested, and whether he be entitled thereto under the instrument by which the same were respectively created, or under any disposition thereof by deed or will, and also to all rights of entry

for conditions broken and other rights of entry, and also to such of the same estates, interests and rights respectively, and other real and personal estate as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will."

It is doubtful whether an estate *pur autre vie* limited to a man and the heirs of his body can be disposed of, since section 10, which makes devisable all real estate which if not devised would devolve upon the heir-at-law, or upon his executor or administrator, does not in terms extend to real estate, which would decend to the heir special, if not devised.

A person in possession of land without other title has a devisable interest. (*Asher* v. *Whitlock*, L. R., 1, Q. B. 1.)

The tenth section does not make any kind of personalty bequeathable which could have been bequeathed before January 1st, 1874; thus a testator cannot bequeath a promissory note made to him so as to pass the right to sue upon it, which remains in the executor. (*Bishop* v. *Curtis*, 21 L. J. Q. B. 391.: 1 Jarm., 4th ed., 50.)

Property held by the testator in joint tenancy survives to the other joint tenants and cannot be given

by will. (*Grosvenor* v. *Durston*, 25 Bea. 97.; 1 Jarm., 4th ed., 46.)

Powers to appoint the use in lands, may be exercised by will.

A power to be exercised by an instrument in writing can be exercised by will. (Theobald, 3rd ed.; 69.)

Also a power to be exercised by an instrument in writing executed with certain formalities is exercisable by will executed with those formalities. (Ib.)

The 13th section of *The Wills Act of Ontario* enacts that "no appointment made by will, in exercise of any power, shall be valid, unless the same is executed in manner hereinbefore required; and every will executed in manner hereinbefore required, shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it has been expressly required that a will made in exercise of such power shall be executed with some additional or other form of execution or solemnity." This section only applies to powers which are in terms testamentary, and therefore a power to appoint by instrument in writing executed with certain formalities cannot be exercised by a will

executed only with the statutory formalities. (Theobald, 3rd ed., 70.)

And a *sole trustee* may make an express devise of, or a devise which is capable of operating on freehold estates vested in him as such trustee. (1 Jarm, 4th ed., 47.)

If there are *trustees*, the estates which are the subject of the trust, are held by them as joint-tenants, and on the death of one of them, the whole trust estate survives to the other or others of them, and cannot be disposed of by the will of the trustee dying as aforesaid. (Ib. 46; Ante, p. .)

CHAPTER IX.

WHO MAY BE DEVISEES OR LEGATEES.

Corporations.

It seems that corporations with power to hold land, such as companies incorporated under *The Companies Clauses Act* (R. S. C., 1886, c. 118), and *The Ontario Joint Stock Companies General Clauses Act* (R. S. O., 1887, c. 156), might take by devise except so far as objections might arise on the ground of perpetuity. (Theobald, 3rd ed., 88.)

Aliens.

The incapacity of alienage has been removed by *The Naturalization Act*, and aliens can now take, acquire, hold, or dispose of real and personal property of every description, in the same manner in all respects as a natural-born British subject could. (R. S. C., 1886, c. 113, s. 3.)

Attesting Witnesses.

By section 17 of *The Wills Act of Ontario*, (*R. S. O.*, 1887, c. 109), a gift to an attesting witness, or to the husband or wife of an attesting witness, is null and void.

CHAPTER X.

1. GENERAL PRINCIPLES OF CONSTRUCTION.

PROP. I. In construing a will, the object of the Courts is to ascertain, not the *intention* simply, but the *expressed intentions* of the testator, *i.e.*, the intention which the will itself, either expressly or by implication, declares, or (which is the same thing) the meaning of the words,—the meaning, that is, which the words of the will, properly interpreted, convey. (Hawk, 1.)

The *expressed meaning,* that is, *the meaning of that which the testator has written,* which is equivalent to the intention of the writer, must be ascertained.

PROP. II. In construing a will, the words and expressions used are to be taken in their *ordinary, proper* and *grammatical*

sense;—unless in so reading them in connection with the entire will, or upon applying them to the facts of the case, an ambiguity or difficulty of construction, in the opinion of the Court, arises; in which case the primary meaning of the words may be modified, extended or abridged, and words and expressions supplied or rejected, in accordance with the presumed intention, *so far* as to remove or avoid the difficulty or ambiguity in question, but no further. (Hawk, 2.)

N.B.—In every case the words used must be *capable of bearing* the meaning sought to be put upon them.

PROP. III. *Technical* words and expressions or words and expressions of known legal import, must be taken in their *technical* sense, unless a *clear* intention can be collected to use them in another sense, and that other can be ascertained. (Hawk, 3.)

PROP. IV. The intention of the testator, which can be collected with reasonable certainty from the entire will, with the aid of extrinsic evidence of a kind properly admissible, must have effect given to it, beyond, and even against the literal sense of particular words and expressions. The intention, when legitimately proved, is competent not only to *fix* the sense of ambiguous words, but to *control* the sense even of *clear* words, and to *supply* the place of *express* words, in cases of difficulty or ambiguity. (Hawk, 5.)

Where the words point out the intention, but if given their simple grammatical meaning defeat the intention, then if possible, by natural construction, an import must be given to them which will effectuate and not defeat the intention. (Hawk, 7.)

And where the Court has, to its satisfaction, ascertained the meaning of the testator but has found in the will expressions inconsistent with such intention, though not sufficient to control it, or, expressions which indicate an intention which the law will not

allow to take effect, *such expressions must be discarded or modified.*

And if the will shows that the testator must necessarily have intended an interest to be given which there are no words in the will expressly to devise, the Court is to *supply the defect by implication.* (Hawk, 7.)

2. ON PUNCTUATION.

In construing a will marks of punctuation, as parentheses, stops, capital letters, etc., in the original will, but not in the probate, may be taken into consideration (Hawk, 8.)

The probate is conclusive at to what the *words* of the will are. (Ib.)

3. PAROL EVIDENCE OF INTENTION, WHEN ADMISSIBLE.

RULE: Parol evidence to show what were the *actual testamentary* intentions of the testator is admissible only to determine which of several persons or things was intended under an *equivocal description.* (Hawk, 9.)

The instructions given for the will, memoranda, or

declarations by the testator as to what he had done or meant to do by his will, etc., are admissible under this rule. (Ib.)

Equivocal descriptions are "where one name and appellation doth denominate divers things." (Ib.)

Evidence in the shape of sayings, etc., of the testator, may be, in certain cases, adduced to show in what sense he *habitually* used certain words, even where the description is not equivocal (provided the sense thus sought to be put upon them does not contravene their ordinary and legitimate meaning): this being distinct from evidence adduced to show in what sense he used the works *on the particular occasion* of writing his will. (Ib., 10)

Where the description of a legatee is *inaccurate* but not equivocal a former will may be admitted to show that the testator habitually called a certain person by the inaccurate description. (Ib.)

What Constitutes an Equivocal Description.

The general test of an equivocal description is, that it must apply with entire propriety to *each* of the persons or things in question.

Descriptions which are partly inaccurate are considered equivocal, if the inaccurate part of the des-

cription applies to *none* of the persons or things in in question, while the remaining description is equivocal with respect to them. (Hawk, 11.)

A description may be equivocal which applies with propriety to each of the persons or things in question, although it may apply with somewhat more propriety to one of them than to another.

Parol evidence of intention is *only* admissible to determine *which* of the persons or things in question was intended, and not to show that the words were used in a sense which would include more than one of them. (Ib., 12.)

If the context shows decisively which of the persons or things in question was intended, no ambiguity arises, and evidence of intention will not be admitted. But the evidence from the context must be conclusive. (Ib., 13.)

CHAPTER XI.

DESCRIPTIONS OF PROPERTY, TO WHAT PERIOD REFERABLE.

I.—Old Law.

Wills of Persons who were Dead before January 1st, 1869.

1.—Freeholds.

Rule: Every devise of freehold lands speaks from the date of the will, and describes only the land then belonging to the testator. (Hawk, 14; 1 Jarm, 4th ed., 318.)

Rule: Any codicil duly executed has, *prima facie*, the effect of republishing the will, so as to make the will speak from the date of the codicil, and include lands acquired before the date of the codicil. (Hawk, 14; 1 Jarm, 4th ed., 193.)

But where the testator, by referring to the devise in the will, shows an intention to deal only with the *identical* property devised by the will, and no more, the latter rule does not apply. (*Bowes* v. *Bowes*, 2 B. and P. 500.)

The codicil does not revive a revoked devise. It can only act upon the will as it existed at the time the codicil is made; and at that time the devise revoked, adeemed, or satisfied formed no part of the will.

2.—Leaseholds.

RULE: A bequest of leaseholds *prima facie* speaks from the date of the will, and does not include after acquired leaseholds, nor a renewed lease. (*James* v. *Dean*, 11 Ves., 383; Hawk, 17; 1 Jarm, 4th ed., 320.)

But the context may show that the testator intended any after acquired interest of which he might become possessed by renewal, to pass under the bequest. (1 Jarm, 4th ed., 321.)

3.—*General Personal Estate.*

RULE: A bequest of "all my personal

estate," or "the residue of my personal estate," means the personal estate existing at the death of the testator. (Hawk, 17.)

This rule did not extend to other bequests of personal estate.

II.—New Law.

Wills of Persons Dying after December 31st, 1868.

Rule: Descriptions of real or personal estate, the subject of the gift, *prima facie* refer to and comprise the property answering to the description at the death of the testator. (R. S. O., c. 109, s. 26.)

This rule applies in England to wills made or republished on or after January 1st, 1838.

The Wills Act of Ontario, R. S. O. 1887, c 109, s. 26, enacts that "every will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the will."

This section applies to the will of every person who has died since December 31st, 1868. (Sec. 8.)

Effect of Sec. 26 on the Execution of Powers.

This section will have an important effect in causing devises and bequests to operate as an execution of powers of appointment *created after the date of the will.*

(a.) The effect of sec. 26 and sec. 29 (which also affects general powers of appointment; post, chap. XII.) on general powers of appointment, will be to make all *general* devises and bequests operate as an execution by anticipation of all general powers vested in the testator at the time of his death, although created by an instrument subsequent in date to the will, unless the language of the power be such as to forbid its being exercised by anticipation.

There must be an emphatic reference to *future* time.

(b.) Special powers of appointment, which are affected by sec. 26, only created after the date of the will may be exercised by a bequest contained in the will, if the bequest contain a sufficient description of the particular property afterwards made the subject of the power to show that the testator *had the*

subject of the power in view, which is the best of execution as regards special powers.

Exceptions to sec. 26.

(1.) Where the date of the *will* as opposed to the death, is distinctly referred to, the rule is excluded. Such an expression as "now occupied" is sufficient. (Hawk, 20.)

(2.) And the rule is excluded where there is a sufficient particularity in the description of the specific subject of gift, showing that an object in existence at the date of the will was intended; as a gift of "my *brown* horse," or "that freehold estate *which I purchased* of Mr. B." (Ib.)

CHAPTER XII.

DEVISES AND BEQUESTS WHEN OPERATING IN EXECUTION OF POWERS.

If the will does not purport to be in execution of the particular power, or of all powers vested in the testator, it is a rule that—

RULE: Devises and bequests *prima facie* do not include property not the testator's own, but over which he had a power of disposition. (*Clerc's Case*, 6 Co. 17, *b*; 1 Jarm., 4th ed., 677.)

Exception. If the property subject to the power be *sufficiently described*, so that it is clear that the testator *had in view the thing* of which he had a power to dispose, the devise will operate as an execution of the power. (Hawk 23; 1 Jarm., 4th ed., 679, 680.)

DENN *v.* ROAKE.

RULE: If a testator devise "all his

lands," or "all his lands in A," or "all his real estate," and have at the time of the devise no lands of his own answering to the description, lands over which he had a power only, will pass by the devise. (*Denn* v. *Roake* [H.L.], 6 Bing. 475, E.C.L.R. vol. 9.)

Leasehold estates come within this rule.

The rule in *Denn* v. *Roake* is unaffected by *The Wills Act of Ontario.*

Where a will refers to part of a subject, or to some of many subjects, over which a testator has a power of appointment, that alone will not make the will operate as an execution of the power as to the parts or subjects not referred to in the will. (Hawk. 26.)

3.—New Law.

Rule. In wills made or republished on or after January 1st, 1874, general devises of real estate, and bequests of personal estate described in a general manner, are construed as including real or personal estate which the testator may have power to appoint *in any manner* he may think proper

(*i.e.* "*to any objects* he may think proper," and not "by any form of execution"); unless a contrary intention appears by the will R.S.O., c. 109, s. 29.)

This rule applies in England to wills made or republished on or after January 1st, 1838.

Section 29 of *The Wills Act of Ontario* enacts that "a general devise of the real estate of the testator, or of the real estate of the testator in any place, or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate to which such description will extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention appears by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal estate, or any personal estate described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description will extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of

such power, unless a contrary intention appears by the will."

It will be observed that this section makes a distinction between *general* and *special* powers of appointment, only affecting the latter.

If a power of appointment has already been exercised by deed, but with the reservation of a power of revocation and new appointment, sec. 29 will not cause a mere general devise or bequest to operate as an exercise of the power of revocation. (Hawk, 28.)

A power to appoint generally *by will* is within this section; (1 *Sugd. Pow.*, 7th ed. 369,) but not a power to appoint in any manner *to children*, or any other limited class of objects. (Hawk, 28; Jarm., 4th ed., 688.)

If property over which the testator has a power of appointment is described as his own, *e.g.*, "property which I am possessed of or entitled to," it will not affect the operation of a devise or bequest of such property, as an execution of the power. (Hawk, 28.)

The words, "constituting A. B., my residuary legatee," will operate as an execution of all general powers as regards personal estate. (Hawk, 29.)

General pecuniary legacies, with no particular fund indicated for their payment, are within the operation of sec. 29, where the proper assets of the testator

are inadequate, and will include and extend to the personal estate subject to the power of appointment, so far as is necessary to satisfy general pecuniary legacies described in a general manner. (Ib.)

CHAPTER XIII.

"LANDS," ETC.: KINDS OF PROPERTY INCLUDED UNDER.

Old Law.

In wills made before January 1st, 1874, a devise of "lands," or "lands and tenements," or "lands, tenements, and hereditaments," does not, *prima facie*, include leaseholds for years, unless at the time of the devise the testator had no freehold lands answering to the description. (*Rose* vs. *Bartlett* Cro. Cas., 293.)

But where leasehold property is blended in situation and enjoyment with freeholds, the rule has not been applied so as to prevent the former from passing with the latter under a devise of "lands" or "tenements."

New Law.

Rule: In wills made or republished on or after January 1st, 1874, every general devise of "lands," "lands in A," etc., *prima facie* includes leaseholds for years as well as freeholds. *R. S. O.*, c. 109, s. 28.

This rule applies in England to wills made or republished on or after January 1st., 1838.

Sec. 28 of *The Wills Act of Ontario*, enacts that "a devise of the land of the testator, or of the land of the testator in any place or in the occupation of any person named in his will, or otherwise described in a general manner, and any other general devise which would describe a leasehold estate, if the testator had no freehold estate which could be described by it, shall be construed to include his leasehold estates, or any of them to which such desription will extend (as the case may be), as well as freehold estates, unless a contrary intention appears by the will."

RULE: A devise of "lands," "real estate," etc., includes reversionary interests of whatever description. (*Church* v. *Munday*, 15 Ves., 396; Theobald, 3rd ed., 157.)

CHESTER *v.* CHESTER.

RULE: A devise of lands "not settled," includes an unsettled reversion in settled lands. (*Chester* v. *Chester*, 3 P. W., 56; Theobald, 3rd ed., 156.)

Where a testator speaks of his property "not settled" or "out of settlement," the Court intends him to mean *not otherwise disposed of.* (Hawk, 35.)

RULE; A general devise of "my lands," "my lands in A," "my real estate," etc. includes and passes the legal estate in lands of which the testator was seised as trustee or mortgagee, unless an intention appear to the contrary. (*Braybrooke* v *Inskip*, 8 Ves., 435: Theobald, 3rd ed, 161.)

The rule will not apply where the testator makes such a disposition by his will as he could not intend to make of property not beneficially his; as, for instance, where a testator devises his property to trustees in trust for sale, or devises it subject to a charge, or to beneficial uses, or to successive limitations, or to a numerous and unascertained class; in these cases trust and mortgage estates do not pass. (Hawk, 35-37.)

A general devise which passes the legal estate in a mortgage does not pass the beneficial interest in the money secured by the mortgage, which is personal estate, and passes under the general or residuary

bequest of personal estate contained in the will. (Hawk, 37.)

But if there is another devise in the will which more properly includes the mortgaged property, it would seem that the legal estate in the mortgaged lands would pass under the latter devise. (Ib., 37.)

And where the testator has the legal estate in a mortgage, and the beneficial interest is also vested in him, the legal estate passes under a gift of "all the rest of my real and personal estate to A, for her own use and benefit," though there may be a charge of debts. *(Re Stevens' Will*, 6 Eq., 597.)

In such a case it is reasonable to suppose that the beneficial ownership and the legal estate were meant to go together. (Theobald, 3rd ed., 161).

Lands Contracted For.

RULE: A general devise of the testator's lands, etc., includes lands contracted to be purchased by the testator, but not actually conveyed. *(Acherley* v. *Vernon*, 10 Mod., 518.)

This rule now extends to lands contracted to be purchased, after the date of the will. (R. S. O. 1887, c. 109, ss. 25, 26.)

Lands contracted to be sold.

A contract to sell land devised operates as a revocation of the devise, so far as any beneficial interest in favor of the devisee by virtue of the devise is concerned; and the devisee takes the legal estate in trust for the purchaser, but will not be entitled to the purchase money beneficially. (*Ross* v. *Ross*, 20 Grant Ch., U. C., 203). But if the testator *specifically* devised the estate contracted to be sold in such a way as to show that he intended the beneficial interest in it to pass, the devisee, it seems, would be entitled to the purchase money of it. (Hawk, 38.)

CHAPTER XIV.

RESIDUARY BEQUESTS AND DEVISES.

1.—*Residuary Bequests.*

RULE: A general residuary bequest carries lapsed and void legacies. (1 Jarm., 4th ed., 761, 768; Wms. Exs., 8th ed. 1464; Hawk, 40.)

If personal estate is not effectually given, it is, legally speaking, undisposed of, and included in the denomination of residue. It may be undisposed of, on account of the death of the legatee to whom it is bequeathed, in which case the legacy *lapses*, or, from the remoteness and consequent illegality of the bequest, when the legacy is *void*. It may have been given, but if it is not *effectually* given, it is undisposed of and included in the denomination of residue. The testator, in the case of a lapsed legacy, is supposed to give it away from the residuary legatee only

for the sake of the particular legatee, and if the latter dies, the testator is supposed to have intended the residuary legatee to benefit by it.

Lapsed Appointments.

Under the 29th section of the Wills Act, property over which the testator has a general power of appointment, and which he has by the will *ineffectually appointed* will pass under the general residuary bequest, as an execution of the power af appointment. (*Eccles* v. *Cheyne*, 2 K. & S., 676.)

The testator may, however, show an intention to circumscribe and confine the residuary bequest so as to exclude from it, *in every event*, property specifically given. (Hawk 41.)

Share of Residue which fails.

If the disposition of a part of the residue fails, such part will not accrue in augmentation of the remaining parts; but instead of resuming the nature of residue, devolves as undisposed of. (1 Jarm., 4th ed., 651, 764; Theobald, 3rd ed., 182.)

Residue means all of which no effectual disposition is made by the will *other than the residuary clause;* but when the disposition of a part of the residue it-

self fails, the will is inoperative as to that part. (1 Jarm., 4th ed., 764; Hawk, 42)

Residue of "Residue."

The word residue cannot be construed to mean a gift of the *residue* of that residue. (Hawk. 43.)

Intermediate Income.

RULE: A general residuary bequest contingent in terms, carries the intermediate income, which is not undisposed of, but accumulates. (*Trevanion v. Vivian*, 2 Ves., sen. 430; 1 Jarm., 4th ed., 652.)

As regards *specific bequests* generally, it appears that the intermediate income does not pass to the legatee until the period of vesting. (Hawk, 44.)

2. Residuary Devises.

RULE: In wills made before January 1st, 1874, a residuary devise of real estate does not include specific devises which lapse. [Hawk, 44.]

But a residuary devise will include devises void *ab initio*, as being intended to comprise all that the will does not otherwise actually dispose of *at the time of the devise.* (Ib.)

NEW LAW.

RULE: In wills made or republished after January 1st, 1874, real estate comprised in devises which fail or are void, passes under the residuary devise in the will, unless an intention appear to the contrary. [R.S.O., c. 109, s. 27.]

This rule applies in England to wills made or republished after January 1st, 1838.

Section 27 of *The Wills Act of Ontario* enacts that "unless a contrary intention appears by the will, such real estate or interest therein as is comprised or intended to be comprised in any devise, in such will contained, which fails or becomes void by reason of the death of the devisee in the life-time of the testator, or by reason of such devise being contrary to law, or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will."

This section applies only to *general* residuary devises, and does not extend to devises of the residue of particular property. (*Eccles* v. *Cheyne*, 2 K. & J., 676.)

Intermediate Income.

Devises, specific or residuary, (*Hopkins* v. *Hopkins*, 1 Ves., sen. 268), to take effect at a future time do not, in general, carry the intermediate rents and profits until the period of vesting. But it is the rule that :—

RULE : A gift of the testator's residuary *real and personal* estate (blended), though contingent in terms, carries the intermediate rents and profits of the real estate, as well as the income of the personal estate (*Genery* v. *Fitzgerald*, Jac. 468 ; 1 Jarm. 4th ed., 653 ; Theobald, 3rd ed, 129.)

Where a testator mixes up real and personal estate in the same clause, he is deemed to have shown an intention that the rule as to personal estate (Ante p. 50) shall operate on the real estate. (Hawk, 46.)

Proceeds of Real Estate.

RULE : A general or residuary bequest of

the testator's personal estate does not, *prima facie*, include the proceeds of real estate directed by the will to be sold. (*Maugham* v. *Mason*, 1 V. & B., 410.)

Nothing is the personal estate of a testator that was not so at his death.

Exception :—Where the testator directs that the proceeds of the sale of the real estate shall form part of his personal estate. (*Durour* v. *Motteux*, 1 Ves., sen. 320 ; Theobald, 3rd ed., 187.)

CHAPTER XV.

WORDS DESCRIPTIVE OF PROPERTY.

Securities for Money.

RULE: A gift of "securities for money," or "mortgages," passes the entire benefit of he mortgage security, including the legal estate in the premises subject to the mortgage. (Theobald, 3rd ed, 143; 1 Jarm., 4th ed, 698, 699; Hawk, 48)

"Mortgage" includes any lien for unpaid purchase money, and any charge, encumbrance, or obligation of any nature whatever upon any lands or tenements of a testator or intestate. (R. S. O., c. 109 s. 9, s.s. 4.)

A bequest of "securities for money" will pass stock in the funds, (*Boscoby* & *Pack*, 1 Sim. St., 500); but not Bank Stock; nor Shares in a Company. (*Hudleston* v. *Gouldsbury*, 10 Bea. 547.) Nor money lent on mortgage where the legal estate is in trustees, and the testator is entitled only to the residue after

certain payments. (Theobald, 3rd ed., 143.) But it will pass a vendor's lien for unpaid purchase money. (*Callow* v. *Callow*, 58 L. J., ch. 698); a Life Policy (*Lawrence* v. *Galsworthy*, 3 Jur., N. S., 1049); also Bonds (*Dicks* v. *Lambert*, 4 Ves., 725.) Bills of Exchange, Promissory Notes, and Cheques (*Barry* v. *Harding*, 1 J. & La. T., 475); and perhaps money due on a Judgment; (*West Ham.* v. *Ovens*, 42 L. J. M. C., 29; L. R., 8 Ex., 37.)

A bequest of "*money on securities*" does not, *prima facie*, pass the legal estate in a mortgage. But if the testator shows that he intends the legatee to have the power of calling in the mortgage, that will cause the legal estate to pass. (1 Jarm. 4th ed., 699.)

Money.

A gift of the testator's "money" or "moneys" will pass cash in the house, bank notes, money at the bank on a current account as well as on deposit, money in the hands of an agent of the testator, arrears of a superannuation allowance from government and money payable by a friendly society for funeral expenses, and any sums actually due and really payable—sums in fact of which, at the time of the testator's death, he might have claimed immediate payment. (Theobald, 3rd ed. 139.)

But the term "money" will not pass an apportioned part of an annuity, nor accruing interest, nor money deposited with a stakeholder to abide the event of a bet, nor money due on a current account from a salesmaster, nor a legacy not acknowledged to be at the testator's disposal, nor stock in the funds, nor a sum due to the testator. (Ib.)

Ready Money.

A bequest of the testators "ready money" includes cash at a banker's on a current account or in the hands of an agent used as a banker. (*Parker* v. *Marchant*, 12 L. J., Ch. 385; 1 Phill., 356.)

The term "ready money" will not pass notes of hand, nor debts due from an agent, nor unreceived dividends on stock, nor money in the hands of a salesmaster, nor rent or interest due on a mortgage. (1 Jarm, 4th ed., 769; Theobald, 3rd ed., 142.)

ROGERS *v.* THOMAS.

"Money" remaining after payment of debts.

RULE: Where there is no other general residuary bequest, and there is a bequest of the "money" *remaining*, or which may *remain* after payment of the testator's debts

and legacies, or after payment of his debts, the word "money" is held to comprise the whole residuary personal estate of the testator. (*Rogers* v. *Thomas* 2 Keen, 8; Theobald, 3rd ed, 140.)

The general personality being liable to pay debts and legacies; the residue must be a residue *ejusdem generis.*

This rule is extended to a bequest of "money" which may remain after payment of the testator's *funeral expenses*; but the rule is excluded if the gift of the remainder of the testator's "moneys" be followed by a bequest of "wearing apparel, trinkets, and all other *property* I may die possessed of," and the rule cannot be extended to a bequest of "*ready* money" so as to make a gift of it remaining after payment of his debts carry the whole personal estate. (Hawk, 52, 53.)

"*Estate.*"

RULE: The word "estate" comprehends both the real and personal estate of the testator. (*Barnes* v. *Patch*, 8 Ves., 604; Hawk, 53.)

This rule holds good even where the language of the will applies to personal estate only. (*O'Toole* v. *Browne*, 3 E. & B., 572.)

"*Effects.*"

RULE: The word "effects" is confined to personal estate, and does not include real estate, unless an intention appear to the contrary. *Doe d. Hick* v. *Dring*, 2 M. & Sel., 448; 1 Jarm., 4th ed., 724; Theobald, 3rd ed., 154.)

"*Goods,*" "*Chattels.*"

RULE: The word "goods" and the word "chattels," *prima facie* comprise the whole personal estate of every description. (*Kendall* v. *Kendall*, 4 Russ, 370; 1 Jarm., 4th ed., 751.)

But the nature of the bequest may show that particular species of personal property could not be intended to pass by it. (Q. v. 1 Jarm., 4th ed., 752, *et seq.*)

"Goods" and "Chattels" are synonymous terms.

CHAPTER XVI.

OBJECTS OF GIFT GENERALLY.

BROWN *v.* HIGGS.

RULE: If real or personal estate be given to or for the benefit of *such of* certain objects as A. shall appoint, or to or for the benefit of certain objects *in such proportions* as A. shall appoint, and there is no gift in default of appointment:—if the power of selection or distribution be not exercised, the gift is not void for uncertainty, but the property is held divisible among *all* the objects of the power equally. (*Brown* v. *Higgs*, 4 Ves. 708; 5 Ves. 495; 8 Ves. 561.)

This is known as the doctrine of *cy pres*.

Where there is a power to appoint to some objects "*or*" to others, this rule is applicable, although the language of the power is alternative. (Hawk. 58.)

And wherever the rule is applied, the objects will take the property among them as *tenants in common*, and not as joint tenants. (Hawk, 59.)

Where the power of appointment was among *several sets of objects* entirely unconnected with each other, in default of appointment, the distribution is *per stirpes*, one set of objects taking one-half of the fund, and the other set taking the remainder. (Ib.)

Where there is a mere *permission* to give to certain objects, the rule in *Brown* v. *Higgs* does not apply. (Hawk, 60.)

Where there is a *discretion as to giving*, the rule has been held to apply; but not where there is a discretion as to giving or not giving.

If the power has been partially executed, the unappointed part is divisible equally among the objects of the power, without regard to the appointment. Hawk. 61.)

Objects when ascertained. The period for ascertaining the objects to take in default of appointment should be the time when the power ought to have been exercised. (Ib.)

Where the power of appointment is not to arise until a given period, no objects who die before that period can take under the rule in *Brown* v. *Higgs*' (Hawk. 62.)

GARVEY *v.* HIBBERT.

RULE: Where a gift to children describes them as consisting of a specified number, which is less than the number in existence at the date of the will, the Court rejects the specified number on the presumption of mistake, and all the children in existence at the date of the will are held entitled; unless it can be inferred who were the particular children intended. (*Garvey* v. *Hibbert*, 19 Ves., 124; 2 Jarm., 4th ed., 189; Theobald, 3rd ed., 228.)

And the rule holds good where the legacy is of a given amount to *each* child, although the total amount of the gift is increased by the construction adopted. (*Garvey* v. *Hibbert.*) The rule also applies to brothers or sisters, (*Lee* v. *Pain*, 4 Hare, 250); grandchildren, (*Wrightson* v. *Calvert*, 1 Johns & H., 250; and servants, (*Sleech* v. *Thorington*, 2 Ves., 561.)

THETFORD SCHOOL CASE.

RULE: Where sums amounting together to the *whole* rents and profits of certain land

at the time of the devise, are given to charitable purposes, this is in effect a dedication to charity of the land itself, and if the rents increase in amount, the excess arising from such augmentation will be appropriated to charity, and not go, by way of resulting trust, to the person or persons on whom the law, in the absence of disposition, casts the species of property devised. (*Thetford School Case*, 8 Co. Rep., 130; 1 Jarm., 4th ed., 573; Theobald, 3rd ed., 280; Hawk, 64.)

Where the sums given to various charitable objects do not exhaust the whole annual value of the lands at the time of the devise, the objects will not take the increased rents or any portion thereof. (1 Jarm., 4th ed., 573; Theobald, 3rd ed., 280; Hawk, 65.)

And where the whole rents are not specifically appropriated, but the will shows a general intention on the part of the testator to devote the whole rents of an estate to charity, the general charitable intention will be carried out, and the whole of the increased as well as the original rents will be appropriated to charity. (Theobald, 3rd ed., 280; Hawk, 66.)

And where the whole rents at the time of the

devise are disposed of by the will, but part only given to charitable objects, and the remaining part, under the name of surplus or overplus to some other object not charitable, the increased rents go to the latter object. (*Mayor, etc. of Beverly* v. *Attorney-General* 6 H L. Ca., 310.; Theobald, 3rd ed., 280; Hawk, 66, 67.)

A proportionate distribution of the increased rents will be made, where a special intention appears in the will to that effect. (Hawk, 67.)

CHAPTER XVII.

CHILDREN, ETC., WHEN ASCERTAINED.

RULE: A devise or bequest to the children of A., or of the testator, means, *prima facie*, the children *in existence at the testator's death*: provided there are such children then in existence. (2 Jarm., 4th ed. 155, 156; Theobald, 3rd ed., 229; Hawk, 68.)

The rule extends to gifts to grandchildren, issue, brothers, nephews, and cousins, and although the class of children entitled may be further limited by an additional description, the rule applies. It also applies to gifts by way of appointment. (Hawk, 69.)

Exceptions to Rule.

Where the description is such as to make the gift not one to a class, but to particular persons individually, the rule does not apply. (*Bolton* v. *Bailey*, 26 Grant, ch. (U. C.) 361.)

Children born after the testator's death will be ad-

mitted under a gift to children as a class if the intention clearly appear. (Theobald, 3rd ed., 237.)

If words importing futurity be added to a bequest, such addition will not alter the construction where the gift is not immediate. (Theobald, 3rd ed., 236, 237.)

In the case of an immediate gift, the addition of words of futurity is considered as intended to provide for the case of children born after the date of the will and before the testator's death. There are, however, authorities against this construction and the point does not seem to be entirely settled. (Hawk, 70, 71.) In the United States it is generally settled that words of futurity will let in after-born children; and that the use of words of futurity *only* does not exclude children already in existence.

If there are no objects in existence at the death of the testator or period of distribution, the rule does not apply, and all children whenever born may be included, unless an intention appear to the contrary. (Theobald, 3rd ed., 230, 233; Hawk, 71.)

RULE: A devise or bequest of a corpus or aggregate fund to children as a class, where the gift *is not immediate*, vests in

all the children in existence at the death of the testator, but so as to open and let in children, subsequently coming *in esse* before the period of distribution. (*Devisme* v. *Mello*, 1 Bro. C. C. 537; 2 Jarm., 4th ed., 156, 157; Hawk, 71.)

This rule extends to gifts to grandchildren, issue, brothers, nephews, cousins. (2 Jarm., 4th ed., 159, 160.)

It also applies to gifts in the nature of powers, and to gifts in exercise of powers of appointment. (Hawk. 72.)

Where the gift is of a certain sum to *each* of a class of objects at a future period, it is confined to those living at the testator's death, for if after-born children were to be admitted the distribution of the testator's personal estate would have to be postponed until it could be ascertained how many legacies of the given amount would be payable. (*Ringrose* v. *Bramham*, 2 Cox 384; Theobald, 3rd ed., 234; Hawk, 73.)

Objects born after the period of distribution may be included by express words to that effect; but words *importing* futurity do not extend the rule to objects

born after that period. (Theobald, 3rd ed., 236, 237; Hawk, 73, 74.)

The rule applies where a testator has only a reversionary interest expectant upon a life estate previously subsisting, and then disposes of the fund to take effect after the death of the tenant for life. (*Walker* v. *Shore*, 15 Ves., 122); but where there is an immediate bequest of an aggregate fund, and part of it is reversionary, objects born before such portion of the fund actually falls into possession are not entitled to share in it. (*Hagger* v. *Payne*, 23 Bea., 474.)

RULE: When there is a bequest of an aggregate fund to children as a class, and the *share of each* child is made payable on attaining a given age, or marriage, the period of distribution is the time when the *first* child becomes entitled to receive his share, and children coming into existence after that period are excluded. (*Whitbread* v. *Lord St. John*, 10 Ves., 152; 2 Jarm., 4th ed., 160; Hawk, 75.)

It appears that this rule applies to gifts to all classes of relatives embraced in the preceding rules.

The rule does not apply to bequests of a certain sum to *each* of the children of a person at a given age only those in existence at the testator's death being entitled.

The rule applies to cases where the share of each child is made payable on an event personal to him or her, *e.g.*, where a share is payable at 21, or, on death under 21, leaving issue. (*Barrington* vs. *Tristram*, 6 Ves., 344.)

The addition of words of futurity does not prevent the application of the rule so as to let in children born after the first share has become payable; but the rule may be excluded by inference from the context.

The rule is not applicable in the case of a gift to children when the shares are made payable on the *youngest* attaining a given age, and all children, whenever born, are admitted when the payment is postponed till the happening of the event, unless the context shows an intention to the contrary. (2 Jarm., 4th ed., 165; Hawk, 78.)

RULE: A devise or bequest to children "*born*," or to children "*living*," at a given period includes a child *en ventre sa mere* at

that period, and born afterwards. (*Doe* v. *Clark*, 2 H. Bl., 399; 2 Jarm., 4th ed., 185; Theobald, 3rd ed., 234; Hawk, 79.)

CHAPTER XVIII.

Children, &c., Definitions of.

Rule: A gift to children, sons, daughters or issue, means, *prima facie*, *legitimate* children or issue, excluding those who are illegitimate. (2 Jarm., 4th ed., 217; Theobald, 3rd ed., 214; Hawk, 80.)

The rule applies where the words next of kin are used. (Theobald, 3rd ed., 214.) The context may, however, show illegitimate children to have been intended.

Legitimacy is a question of fact, and although a child may have passed as legitimate at the date of the will, such child cannot share in the gift to children, if afterwards discovered to be illegitimate (Hawk, 80.)

Exceptions to Rule.

1. Where the gift is to the children of a person dead at the date of the will, and there are living at

that date illegitimate children *only* of that person, and those facts were known, or can be presumed to have been known, to the testator, there is a necessary inference that, under the word "children" the illegitimate children were intended. (Theobald, 3rd ed., 215, 216; 2 Jarm., 4th ed., 223; Hawk, 81.)

It is sufficient if the fact of the death of the person was presumbly known to the testator; he need not be *described* as dead. And if the gift be to the "*children*" of a deceased person, when he has only left *one* legitimate child, and one or more illegitimate children, living at the date of the will, and there is proof or an inference of a knowledge of these facts on the part of the testator, the illegitimate child or children may take under the gift together with the legitimate child, in order to satisfy the plural number. (Theobald, 3rd ed., 216; Hawk, 82.)

It is essential that the testator should be presumed cognisant of the facts.

2. Where the gift is to the children of a living person, the context may be sufficiently strong to show that particular illegimate children were intended to take under the gift, as *personæ designatæ*. (*Beachcroft* v. *Beachcroft*, 1 Mad., 430: *Dover* v. *Alexander*, 2 Hare, 282; Theobald, 3rd ed., 217, 218; Hawk, 83.).

RULE: A gift to the "children" of a person does not include grandchildren. (*Bowen* v. *Lewis*, 54 L. J., Q. B., 68; 9 App. Ca., 890; Wms. Exs., 8th ed., 1102.)

The rule applies to "grandchildren" so as to exclude great grandchildren. (*Orford* v. *Churchill*, 3 Ves. & B., 59; Wms. Exs., 8th ed., 1107.)

But "children" may be construed to mean "grandchildren," where the gift is to the children of a person dead at the date of the will, who has left grandchildren but no children then living, and it is proved or inferred that the testator was aware of the fact. (*Berry* v. *Berry*, 3 Giff., 134; *Fenn* v. *Death*, 23 Bea., 73; Theobald, 3rd ed., 226.)

RULE: A gift to "nephews" or "nieces" does not include great-nephews or great-nieces. (*Crook* v. *Whitely*, 26 L. J., Ch. 350; 7 D. G. M. & G., 490; Theobald, 3rd ed., 242.)

And it appears that "nephews" or "nieces" do not include nephews or nieces by marriage: unless the testator has no nephews or nieces of his own and no possibility of any. (*Hogg* v. *Cook*, 32 Bea., 641; *Sherratt* v. *Mountfox*, 42 L. J., Ch. 688; 8 Ch. 928; Theobald, 3rd ed., 242.)

And a great grand-nephew is not included in a gift to "grand-nephews," (*Warring* v. *Lee*, 8 Bea., 247) but these extended meanings may be gathered from a context, though not easily.

RULE: A gift to "brothers;" "sisters;"—includes half-brothers and half-sisters. (2 Jarm., 4th ed., 154) and so with regard to every other degree of relationship. (Ib.)

Cf. Leviticus, XVIII. 9. "Thy sister, the daughter of thy father *or* the daughter of thy mother."

RULE: A gift to "cousins" *prima facie* means only *first* cousins. (2 Jarm., 4th ed., 152; Wms. Exs., 8th ed., 1109.)

RULE: A gift to "issue," when not restrained by the context, includes descendants of every degree. (*Davenport* v. *Hanbury*, 3 Ves., 257; 2 Jarm., 4th ed., 101.)

SIBLEY *v.* PERRY.

RULE: Where there is a gift to a person, and then a gift to the issue of that person, such issue to take only the *parent's* share, the word "issue" is cut down to mean

"children." (*Sibley* v. *Perry*, 7 Ves., 522; *Ralph* v. *Carrick*, 48 L. J. Ch., 807, 11 Ch., D. 873; 2 Jarm., 4th ed., 103.)

But where there is a gift over the meaning of "issue," even when collocated with "parent," will frequently be widened to mean decendants. (*Ross* v. *Ross*, 20 Bea., 645; 2 Jarm., 4th ed., 104.)

RULE: Where there is a gift to the "family" of a person who has *children* living at the testator's death, the word means primarily the children of that person and does not include grandchildren or great grandchildren. (*Barnes* v. *Patch*, 8 Ves., 604; *re Parkinson*, 20 L. J., Ch. 224.)

But the word "family" is extremely flexible, and may be controlled by the context. (V. 2 Jarm., 4th ed., 91-97; Theobald, 3rd ed., 250-252.)

An illegitimate child, treated and recognized as a child, would be entitled to participate as part of the "family." (*Lambe* v. *Eames*, L. R. 10, Eq. 267.)

In devises of real estate the word "family" as a word of limitation, would in general give an estate tail, the word being construed as equivalent to "heir of the body." (*Lucas* v. *Goldsmid*, 29 Bea., 657.)

CHAPTER XIX.

DESCRIPTIONS RELATIVE TO SUCCESSION TO PERSONAL ESTATE.

A bequest by a testator to his heir, or to the heir of another person, does not change the proper meaning of the word—heir-at-law—because the subject of the bequest is personal estate. But—

RULE: A bequest of personal estate to "A. or his heirs" is construed as a gift by way of substitution to the heirs, in the event of the death of A. before the period of distribution. (*Doody* v. *Higgins*, 9 Hare App, 32.)

The word "heirs" is held to mean the persons who would be entitled to the personal estate of A. by virtue of *The Statute of Distributions*, if he had died intestate. (Theobald, 3rd ed., 257.)

And on a residuary gift of real and personal estate to the testator's widow, and on her death, to go to

his *heirs and next of kin*, it was held that the beneficiaries, so described, were to be ascertained at the testator's death; and that there was a double description of the same persons. (*Rees* v. *Fraser*, 25 Grant, Ch. [U.C.] 253.)

The heirs take as tenants in common in the proportion fixed by the Statute.

By s. 5 of *The Devolution of Estates Act*, it appears that a husband would be included in the term "heirs."

The rule applies whether the gift be immediate, or in remainder, or whether it be several or to a class; and it will apply to any form of gift where the heirs are to take expressly by way of substitution for the original legatee. (Hawk, 93.)

The persons to take are to be ascertained at the death of the *propositus* whose heirs are spoken of, and not at the period of distribution. (2 Jarm., 4th ed., 129; Theobald, 3rd ed., 262.)

BULLOCK *v.* DOWNES.

RULE: A gift to the *persons* who would be entitled to the personal estate of any one by virtue of the Statutes of Distribution is *prima facie*, a gift to them in the *shares* in which they would take under the Statutes,

and not in joint tenancy. (*Bullock* v. *Downes*, 9 H.L., Ca. 1.)

If there is an express reference in the terms of the gift to intestacy, and not to the Statute, the rule applies. (*Garrick* v. *Camden*, 14 Ves., 372; Hawk, 96, 99.)

NEXT OF KIN.

RULE: A gift to "*next of kin*" whether of the testator or another person, means the nearest blood-relations in equal degree to the *propositus*, and is not equivalent to the term "next of kin" in connection with the administration and distribution of personal estates in case of intestacy (*Withy* v. *Mangles*, 10 L.J., Ch. 391; Theobald, 3rd ed., 258)

Thus, all who are related in equal degree to the *propositus*, as father, mother, and children, take together as joint tenants as regards personal estate (Ib.); but as tenants in common in respect to real estate (R.S.O., c. 168, s. 20); while those who would be entitled under the Statute by representation only are excluded. (*Elmesley* v. *Young*, 2 My. & K., 780.)

In *Rees* v. *Fraser*, 25 Grant, Ch. U.C. 253, "next of kin" was held equivalent to "heirs" with which it was coupled.

GUNDRY *v.* PINNIGER.

RULE: A devise or bequest to "next of kin," "next of kin according to the Statute," etc. means the next of kin *at the death* of the person whose next of kin are spoken of. (*Gundry* v. *Pinniger*, 21 L.J. Ch. 405; 14 Bea., 94; 1 D. G. M. & G., 502.)

The rule applies where the gift be to A. for life, and after his death to the next of kin of the testator, and A. is the sole next of kin at the testator's death, A. takes the property absolutely. (Hawk, 100.) The rule is the same if there be a devise to the heir, and the tenant for life is the testator's heir-at-law at his death. Words of futurity alone do not exclude the rule; but the language of the will *may* be such as to show that the testator intended the next of kin to be ascertained at the period of distribution. (2 Jarm., 4th ed., 139, 140.)

But where the gift is to "next of kin," "next of kin according to the Statute," etc., of a person who

dies in the testator's lifetime, or who is dead at the date of the will, the objects to take are to be ascertained at the death of the testator, as if the person whose next of kin are spoken of had died *at that time*. (2 Jarm., 4th ed., 129; Hawk, 102.)

RULE: A devise or bequest to the "*relations*" of A., or of the testator, is construed to mean the persons who would be entitled under the Statutes of Distributions, either as next of kin or by representation to next of kin. (2 Jarm., 4th ed., 120; Theobald, 3rd ed., 248; *Fielden* v. *Ashworth*, L.R. 20, Eq. 410; *Eagles* v. *Le Breton*, L.R. 15, Eq. 148; 42 L.J., Ch., 362; *Pyot* v. *Pyot*, 1 Ves. sen. 337.)

The objects of a gift to "relations" are not varied by its being associated with the word "near." But Where the gift is to the "nearest relations," the next of kin will take, to the exclusion of those who, under the Statute would have been entitled by representation, but admits all who are in equal degree of consanguinity. (2 Jarm., 4th ed., 124; Hawk, 106.)

The rule in *Gundry* v. *Pinniger* applies to a gift to

"relations," but perhaps not so strictly as to a gift to "next of kin."

RULE: A bequest of personal estate to the "representatives," or "legal" or "personal" or "legal personal representatives" of any one, means *prima facie*, executors or administrators. (Wms. Exs., 8th ed., 1134.)

But this rule is not a strong one.

In the case of a person dying after the 1st day of July, 1886, his personal representative for the time being shall, in the interpretation of any Statute of this Province or in the construction of any instrument to which the deceased was a party, or in which he was interested, be deemed in law his heirs and assigns, unless a contrary intention appears. (R.S.O. 1887, c. 108, s. 10.

CHAPTER XX.

JOINT TENANCY.

RULE: A devise or bequest to several persons *nominatim*, or to a class, without more, creates a joint tenancy. (Hawk, 111.)

This rule has been abolished as regards devises of real estate by Statute, and it is enacted that "whereby any letters patent, assurance or *will*, made and executed after the first day of July, 1834, land has been or is granted, conveyed or *devised* to two or more persons *other than executors or trustees* in fee simple, or for any less estate, it shall be considered that such persons took or take as *tenants in common*, and not as joint tenants, unless an intention sufficiently appears on the face of such letters patent, assurance or will, that they are to take as joint tenants. (R.S.O. 1887, c. 108, s. 20.

RULE: Under a devise or bequest to the children of A. and of B. as tenants in com-

mon, *prima facie*, the children take *per capita*, and not *per stirpes*. (*Lincoln* v. *Pelham*, 10 Ves., 166 ; *Anderson* v. *Bell*, 8 O.R., 531.)

The rule is the same where there is a bequest to A. and the children of B. But where the bequest is to A. and B. as *tenants in common* for life, with remainder to their children, it would seem that the rule should not apply, and that the children should take the share of their respective parents *per stirpes*. (Hawk, 114.)

RULE : Where there is a devise or bequest to a husband and wife and one or more other persons *prima facie*, the husband and wife taken as one person, and take only one share. (Co. Litt., s. 291 ; *re Wylde*, 2 D. G. M. & G., 724 ; 2 Jarm., 4th ed., 251.)

But there may be an implication that the husband and wife are to take as two persons, in which case the rule will not apply.

RULE : A gift to or for the "sole" use of a woman means *prima facie* separate use. (*Adamson* v. *Armitage*, 19 Ves., 416.)

By virtue of section 3, of "*The Married Women's Property Act*," a married woman is now capable of acquiring by will or otherwise any real or personal property, and holding the same as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee. (R.S.O., 1887, c. 132, s. 3.)

CHAPTER XXI.

GIFTS WITHOUT WORDS OF LIMITATION.

RULE : A devise of the "use and occupation" of land passes an estate for life and is not confined to a personal use and occupation. (*Whittome* v. *Lamb*, 13 L. J. Ex., 205; 12 M. & W., 813 ; *Rabbeth* v. *Squire*, 24 L. J., Ch. 203 ; 19 Bea., 70 ; 1 Jarm., 4th ed., 798.)

The word "occupy" does not *prima facie* mean *personally* occupy.

RULE : A devise of the "rents and profits," or of the "income," of land is equivalent to a devise of the land itself. (1 Jarm., 4th ed., 797.)

Previous to the 1st January, 1874, a devise of the "rents and profits" would pass only an estate for life, unless words of inheritance are added, but in a will made or republished after that date, such a devise would, by force of the 30th section of "*The Wills Act of Ontario*," pass the fee simple.

RULE: A trust to raise and pay money out of the "rents and profits" of land is sufficient to create a charge on the *corpus* of the land where the purposes of the trust require it. (Lewin, 8th ed., 419; Hawk, 120.)

But if it is evident from the whole context that by "rents and profits" were intended the *annual* rents, the rule will not apply. (Lewin, 420.)

Recourse may be had to the *corpus* by sale or mortgage in order to raise the portion. (Ib., 419.)

RULE: A bequest of the income of personal estate, without limit as to time is equivalent to a gift of the principal. (Theobald, 3rd ed., 351; Hawk, 123.)

RULE: The bequest of an annuity, not existing before, *simpliciter*, generally means an annual sum during the life of the annuitant (*Re Taber*, 51 L. J., Ch. 721), and nothing more. (*Blight* v. *Harmoll*, 51 L. J., Ch. 163; 19 Ch. D. 294.)

But where there is a direction to purchase an annuity, or a dedication of a fund out of which it is to be

purchased, or where the annuity is dealt with as being in existence and operative beyond the life of the first annuitant, and no other period can be fixed for such further duration short of making it perpetual, the annuity will be in perpetuity. It is, in fact, a bequest of such a sum as will produce the income or annuity intended for the legatee, who may elect to take that sum or have the annuity; and in the even of his death before the annuity is purchased the sum which would have been needed for its purchase will go to his representatives. (Wms. Exrs., 8th ed., 1200, 1201.)

CHAPTER XXII.

DEVISES WITHOUT WORDS OF LIMITATION.

In wills made before 1st January, 1874, a devise of lands to any person, *simpliciter*, would confer as large an estate as the testator had in the land, unless a contrary intention was expressed. (R.S.O. 1887, c. 109, s. 4.)

And in wills made after 1st January, 1874, it is a rule that—

RULE: A devise of lands, without any words of limitation, passes the fee simple, unless an intention appear to the contrary.

Section 30 of *The Wills Act of Ontario* enacts that "where any real estate is devised to any person without any words of limitation, such devise shall, subject to *The Devolution of Estates Act*, be construed to pass the fee simple, or other the whole estate or interest, which the testator had power to dispose of by will, unless a contrary intention appears by the will."

This section applies only to devises of previously existing estates or interests, and not to the devises of an estate created by the will. *E.g.;* a devise of a

rent charge, already vested in the testator, passes the fee simple without words of limitation; but if the rent charge is not vested in the testator at the time of the devise, without words of limitation, it only confers a life estate. (Hawk, 139.)

A devise of a testator's "estate" includes not only the *corpus* of the property, but the whole of his interest therein. (2 Jarm., 4th ed., 275.)

CHAPTER XXIII.

ESTATES OF TRUSTEES.

Estates taken by trustees under a devise to them may be considered under two heads.

I. As to the quantum of *estate and interest*, beneficial as well as legal, vested in the trustees for the active purposes (if any) of the trust reposed in them.

RULE: A devise to a trustee, in trust to *pay* the rents and profits to A., vests the legal estate in the trustee. (Lewin, 8th ed., 210; Theobald, 3rd ed., 322.)

A devise to a trustee, in trust to *permit*, or, to *permit and suffer*, A. to receive the rents and profits, vests the legal estate in A. (Lewin, 8th ed., 210; Theobald, 3rd ed., 322.)

A devise in trust to "pay unto *or* permit and suffer." A. to receive the rents, vests the legal estate in A. (Lewin, 8th ed., 212; Theobald, 3rd ed., 322.)

But a devise in trust to permit A. to receive the *net* or *clear* rents and profits, vests the legal estate in the trustee; for he is to receive the rents and pay thereout the land tax and other charges on the estate and hand over the *net* rents only to the person entitled. (Lewin, 8th ed., 211; Theobald, 3rd ed., 322.)

And by sec. 33 of *The Wills Act of Ontario* it is declared that "where any real estate is devised to a *trustee or executor*, such devise shall be construed to pass *the fee simple*, or other the *whole estate or interest* which the testator had power to dispose of by will in such real estate, unless a *definite term of years* absolute or determinable, or an *estate of freehold* is thereby given to him *expressly* or *by implication*."

The meaning of this section is that any devise, under which before the passing of the act a trustee would have been held to take an indefinite or uncertain term of years, shall now be construed to pass the fee. (Lewin, 8th ed., 220.)

II. As regards the disposition of so much of the *legal estate* as is not required for the active purposes of the trust.

RULE: Wherever a trust is created, a legal estate sufficient for the execution of the

trust shall, if there are no words of inheritance, if possible, be implied. (Lewin, 8th ed., 220.)

RULE: The legal estate limited to the trustee shall not be carried further than the complete execution of the trust necessarily requires. (Ib.; Hawk, 143.)

These rules are somewhat controlled by the positive enactment of *The Wills Act of Ontario.*

By section 34 it is enacted that—

"Where any real estate is devised to a trustee *without any express limitation of the estate* to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, is not given to any person for life, or such beneficial interest is given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall, subject to *The Devolution of Estates Act*, be construed to vest in such trustee *the fee simple* or other *the whole legal estate*

which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust are satisfied. (R. S. O. 1887, c. 109, s. 34.)

In comparing the 33rd and 34th sections it will be observed that the former, which speaks of a devise passing "the fee simple or other the whole *estate or interest* of the testator," relates to the quantity of estate to be taken by the trustee for the purposes of the trust; while the latter, which declares that a devise shall vest in trustees "the fee simple or other the whole *legal estate*" in the premises devised, relates to the disposition of the legal estate not required for the purposes of the trust. Section 33 enacts that in no case shall trustees or executors be held, for the purposes of the trust, to take an indefinite term of years; section 34 enacts that where the estate of the trustees is not expressly limited, they shall in all cases take either an estate determinable on the life of a person taking a beneficial life interest in the property, or the absolute *legal* estate in fee simple.

CHAPTER XXIV.

PRECATORY TRUSTS.

RULE: Words of Recommendation, Request, Entreaty, Wish, or Expectation, addressed to a devisee or legatee, are *prima facie* considered as obligatory, and will make him a trustee for the person in whose favour such expressions are used. (1 Jarm., 4th ed., 385; Lewin, 8th ed., 130.)

Each of the following phrases in wills has been held to create a Precatory Trust:—

"*Advise* him to settle," "well *assured*," "have full *assurance* and confident *hope*," "*authorize* and *empower*," "*beg*," "in the full *belief*," "most heartily *beseech*," "*confide*," "have the fullest *confidence*," "in *consideration* the legatee has promised to give," "under the firm *conviction*," "*of course* the legatee will give," "declare," "desire," "direct," "do *not doubt*," "dying request," "dying wish," "*empower*," "entreat," "hope,"

"last will," "well *know*," "*order and direct*," "*recommend*," "*request*," "*trusting*," "*trusting and confiding*," "*well know*," "will," "*will and declare*," "*will and desire*," "*wish and desire*," "*wish and request*," "to be applied as I have *requested* him to do." (Lewin, 8th ed., 130, 131; Theobald, 3rd ed., 357; Hawk, 160-162; Stroud's Judicial Dict., 606-608.)

It is essential to the creation of the trust that there should be (1) a *certain* subject, and (2) a *certain* object of the trust to be so created. (Stroud's Judicial Dict., 606.) A trust is created in those cases only where a testator points out *the objects*, *the property*, and *the way in which it shall go*. (Lewin, 8th ed., 132.)

Where the words of the will show that the testator did not intend the desire or wish to be imperative, but that he meant to leave it to the devisee or legatee to act thereon or not at his discretion, no trust is created. (Hawk, 163.)

And the Court has refused to establish the trust where the nature and quantum of the *subject* (that is, of the property claimed to be bound by the trust), and the nature of the *objects*, has been uncertain. (Lewin, 8th ed., 133, 134.)

CHAPTER XXV.

HEIRS, HEIRS MALE, ETC.

RULE: Under a devise to "heirs male (or female) of the body" of any person, the heir male of the body taking by purchase need not be heir general. (*Wills* v. *Palmer*, 5 Burr. 2615: 2 Jarm., 4th ed., 67; Hawk, 170.)

E.g.: A devise to the "heirs male of the body" of A., who has died leaving a younger son, and a daughter of a deceased elder son; the younger son will take an estate in tail male by virtue of the devise, although the granddaughter is heir. (Ib.)

RULE: "Heirs male of the body," or "issue male" mean decendants *in the male line* only, *i.e.*, males claiming through males. (*Fitzherbert* v. *Heathcote*, cited 4 Ves., 794: *Lambert* v. *Peyton*, 8 H. L. Ca., 1; Co. Lit., 25a: Theobald, 3rd ed., 254; Hawk, 172.)

RULE: "Heirs male," in a will, as words of limitation, are construed to mean "heirs male of the body," and will create an entail. (Lewin, 8th ed., 118; Theobald, 3rd ed., 306; Hawk, 173; 2 Bla. Com., 115.)

ARCHER'S CASE.

RULE: Under a devise to A. for life with remainder to the *heir male* (in the singular) *of his body* and the heirs male of the body of such heir male, A. takes an estate for life only, and the heir male of his body takes an estate in tail male as purchaser. (*Archer's Case*, 1 Co. 66; 2 Jarm., 4th ed., 326.)

RULE: A devise of real estate to A. and his heirs *lawfully begotten* confers only an estate tail, "heirs" being construed "heirs of the body." (2 Jarm., 4th ed., 325; 2 Bla. Com. 115; Co. Lit., 27a.)

But a limitation to "lawful *heirs*" will not, standing alone, create an entail, but gives the fee. (2 Jarm., 4th ed., 325.)

Prior to January 1st, 1874, a devise of real estate to a person and his *heirs*, followed by a limitation over to take effect on a *general* failure *at any time* of issue or heirs of the body of that person, vested in him only an estate tail; the word "heirs" being construed to mean "heirs of the body." But by section 32 of *The Wills Act of Ontario*, the expressions "die without issue," or "die without leaving issue," or "have no issue," or any other words which import either a want of failure of issue of any person in his lifetime, or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or *at the time of the death* of such person, and "heirs" cannot be restrained to mean "heirs of the body."

RULE: If real estate be devised to B on failure of *heirs* of A, and B. is capable of being heir to A, the word "heirs" is construed to mean "heirs of the body," since otherwise the devise to B. could never come into operation. (*Harris* v. *Davis* 1 Coll, 423; *Iler* v. *Elliott*, 32 U. C. Q. B., 434; *Jardine* v. *Wilson*, Ib., 498; *Tyrwhitt* v.

Dewson, 28 Grant, Ch. [U.C.] 112; Theobald, 3rd ed., 302.)

NECESSARY IMPLICATION.

RULE: If real estate be devised after the death of a certain person to the heir-at-law of the testator, and the will contains no disposition of the property during the life of that person, he takes an estate for life by implication. (*Stevens* v. *Hale*, 2 Dr. & Sm., 22; *Crauley* v. *Dixon*, 23 Bea., 512; 1 Jarm., 4th ed., 532, *et seq*.)

This rule is applicable to bequests of personal estate including terms for years. (1 Jarm., 4th ed., 544.)

RULE: A devise of real estate to "A. or his heirs" gives to A. an estate in fee, the word "*or*" being read "and." (1 Jarm., 4th ed, 505 *et seq.*; Wms Exs, 8th ed., 1089.)

The rule applies to a devise to "A., *or* the heirs of his body."

And "where any real estate is devised by any testator, dying after the 5th day of March, 1880, to the

heir or heirs of such testator, or of any other person, and no contrary or other intention is signified by the will, the words "heir" or "heirs" shall be construed to mean the person or persons to whom such real estate would descend under the law of Ontario in case of an intestacy." (R. S. O., 1887, c. 109, s. 31.)

It would appear that a devise to "A. or his heirs" would lapse by the death of A. in the testator's lifetime, unless A. happened to be a child or other issue of the testator. (R. S. O., 1887, c. 109, s. 36.)

Not so in the case of a devise to "A. or the heirs of his body." A. dying in the testator's lifetime but leaving issue who would be inheritable, any of such issue living at the testator's death, for the devise will take effect as if A. had died immediately after the death of the testator, unless a contrary intention appears by the will. (Ib., s. 35,)

But where there is a bequest to "A. *or* his personal representatives," or to "A. *or* his heirs" the word "*or*," generally speaking, implies a substitution, so as to prevent a lapse. (Wms. Exs., 8th ed., 1215, 1216.)

CHAPTER XXVI.

ESTATES TAIL, ETC.

ESTATES TAIL, CY PRES.

RULE: Where a testator has devised lands in a manner transgressing the limits of perpetuity. (Q. V., 1 Jarm., 4th ed., Ch. IX, sec. II.), and the Court can, by giving estates tail to any of the devisees, carry the property in the precise course marked out by the testator, supposing the estates left to themselves, it will do so. (*Humberston* v. *Humberston*, 1 P. Wms., 332; *Parfitt* v. *Humber*, L. R. 4 Eq., 443; Theobald, 3rd ed., 411.)

E.g.: If real estate be devised to A. for life, with remainder to his first and other sons successively in tail, with remainder to his daughters as tenants in common in tail, with cross-remainders between them, and A. is unborn at the death of the testator, the limi-

tations to his children being void for remoteness, A. is held to take an estate tail, to effect as far as may be the intention.

Words of Limitation.

Rule: In devises of real estate, the words "heirs of the body," following a gift to the ancestor, are properly words of limitation, and create an estate tail, notwithstanding the addition of inconsistent words or expressions. (Theobald, 3rd ed., 306; Hawk, 184.)

This rule holds good unless the testator has *explained* the words in question as having been used in some other sense.

If there are words in the will, implying that the heirs are to take distributively or together, and not successively, they do not exclude the rule, but are rejected as repugnant. (Hawk, 185.)

Words of limitation superadded do not exclude the operation of the rule. (Theobald, 3rd ed., 306.)

Rule: A bequest of personal estate or chattels real "to A. and the heirs of his

body,," or "to A. for life, and after his decease to the heirs of his body," vests the property in A. absolutely. (Wms Exs., 8th ed., 1111.)

A bequest of personalty in terms which, if applied to real estate, would create an entail, vests the property absolutely in the first taker. (*Re Barker,* 52 L. J., Ch. 565.)

RULE: In devises of real estate, "issue," is *prima facie* a word of limitation which, when uncontrolled by the context, is equivalent to, but more flexible than "heirs of the body," (*Roddy* v. *Fitzgerald,* 6 H.L. Ca., 823: *Bowen* v *Lewis,* 54 L.J.Q.B., 55; 2 Jarm., 4th ed., 414, *et seq.*)

This rule does not extend to bequests of personal estate. (*Knight* v. *Ellis,* 2 Bro. C.C., 570.

LEES *v.* MOSLEY.

RULE: Where there is a devise to one for life, with remainder to his issue *as tenants* in common, with a limitation to the *heirs*

general of the issue, the issue take as purchasers in fee. (*Lees* v. *Mosley*, 1 Y. & C., 589: *Ralph* v. *Carrick*, 11 Ch. D. 882, 885; *Morgan* v. *Thomas*, 51 L J, Q.B., 289, 456; 9 Q.B.D. 643)

Words of limitation, in fee, or in tail and of distribution added to the word "issue," make it a word of purchase, whether there is a limitation over in default of issue or not.

Words of distribution alone, without superadded words of limitation, if the issue can take the fee by the terms of the devise, do not exclude the rule. (Hawk, 193.)

As to the meaning of "issue" in relation to personal estate V. 2 Jarm, 4th ed., 567-581.

Wild's Case.

The word "children" in its primary sense, is to be read as a word of purchase, and not as a word of limitation. (Bowen v. Lewis, 54 L J., Q.B. 63), but—

Rule: A devise of real estate to "A. and his children," *he having none at the time of the devise*, the word children must be taken as a

word of limitation, and A. would take an estate tail. (*Wild's Case*, 6 Co. 17; Wms. Exs., 8th ed., 1097: 2 Jarm., 4th ed., 389; Hawk, 198.)

The principle of *Wild's Case* applies even where there is a child of A. *en ventre sa mere* at the death of the testator. (Roper v. Roper, 36 L.J., C.P. 270 37 Ib., 7.)

But the Courts have construed the word "children" as a word of limitation, notwithstanding the existence of children at the date of the will. (2 Jarm., 4th ed., 395.)

The rule does not apply to a bequest of personal estate, in which case the parent and children, if any, take concurrently; if there are no children the parent takes the whole. (Hawk, 199.)

Gift over on Failure of Issue.

RULE: A devise of real estate to A. for life, or to A. indefinitely, followed by a gift over on *general* failure of issue, vests in A. an estate tail. (*Re Babcock*, 9 Grant Ch. (U.C.) 427.)

The rule has been changed since 1874, and A. will now take only an estate for life, in the case of a devise for life; and where the devise is to A. indefinitely, he will take an estate in fee simple with an executory devise over on death without issue living at his death; and a devise for life with the like gift over, will confer only an estate for life.

As regards personal estate, a bequest to A., with a gift over on general failure of his issue, vests the property in A. absolutely, the gift over being void for remoteness.

Implication of Cross-Remainders.

RULE: Under a devise of real estate to several persons in tail, being tenants in common, with a limitation over for want or *in default of such issue*, cross-remainders in in tail are to be implied among the devisees in tail. (2 Jarm., 4th ed., 554; *Heron* v. *Walsh*, 3 Grant Ch. (U.C.) 606; *Travers* v. *Gustine*, 20, Grant Ch. (U C.) 106; *Ray* v. *Gould*, 15 U.C., Q.B., 131.)

Where the devise was to three and the heirs of

their bodies respectively, and in default of such issue *of any* of them over, it was held that the remainder over did not take effect until failure of all the issue of each of them, and cross-remainders were therefore implied. (*Powell* v. *Howells*, L.R., 3 Q.B., 654.)

The rule applies whether the devise be to two persons or a larger number, though it be made to them "*respectively*," and though in the devise the testator has not used any words or expressions denoting that the ulterior devise was to comprise the entire property, and not undivided shares. (2 Jarm., 4th ed., 555.) And the rule applies though the ulterior devise is on failure of issue at a particular period. (Ib.)

The rule also applies, in regard to executory trusts at least, though there be an *express* direction to insert cross-remainders among *another* class of objects, or a limitation over among some of the *same* objects; and even in direct devises an express limitation of cross-remainders among *another* class of objects has been held not to repel the implication. (Ib.)

The word "remainder," following a devise to several in tail, will raise cross remainders among them. (Ib.)

It is no objection to the implication of cross-remain-

ders that there is an inequality among the devisees whose issue is referred to; some of them being tenants in tail, and other tenants for life, with remainder to their issue in tail. (Ib.)

A devise to the children of A. *for life*, and *for want and in default of such issue* then over, creates cross-remainders by implication for life among such devisees. (Ib.)

The Wills Act of Ontario does not seem to affect the implication of cross-remainders, as section 32 expressly excepts out of the statutory rule of construction cases in which a contrary intention appears by the will, by reason of a preceding gift being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise. Here an express estate tail is, by the prior devise, given to the person whose issue is referred to by the words, "in default of such issue," etc., from which the cross-remainders are implied; and hence it is clear that the above rule of construction remains untouched by the enacted doctrine.

And a bequest of personal estate to several persons, as tenants in common for life, with a gift over on the death of all, or on the death of the survivor creates cross-remainders by implication for life among such legatees (Hawk, 202.)

FAIRFIELD *v.* MORGAN.

RULE: If real estate be devised to A. in fee simple with a limitation over in the event of A. dying under 21 *or* without issue, the word "or" will be read "and," and the gift over will be construed to take effect only in the event of A. dying under 21 *and* without issue. (*Fairfield* v. *Morgan*, 2 B. & P.N.R., 38; *Re Babcock*, 9 Grant Ch., (U.C.) 427; Hawk, 203; 1 Jarm, 4th ed., 505, 507)

The principle of this rule would not be extended at the present day.

The rule does not apply where the devise to A. is of an estate for life (Hawk, 204,) or of an estate tail. (Theobald, 3rd ed, 491.)

CHAPTER XXVII.

DEATH WITHOUT ISSUE, ETC.

When the words "die without issue" occurred in wills made prior to January 1st, 1874, they were construed to mean the death of the person spoken of and failure of his issue at the time of his death *or at any time afterwards.* This held good as regards both real and personal estate.

But the context might have shown that the testator intended the meaning of those words to be confined to a failure of issue at the time of his death.

E.g.: Where a testator had devised property to A. and his heirs, and if A. died without issue, the property was to go to B. *upon the death* of A., the latter words restrained the gift over to a failure of issue at the death, and A. would have taken an estate in fee simple with an executory devise over, and not an estate tail.

And where there was a bequest of personal estate to several as tenants in common, with a gift over of

the share of anyone dying without issue to the *survivors or survivor*, the words "die without issue would be restrained to a failure of issue at the death of the person whose share was spoken of. But, if, in this case, there had been a devise of real estate instead of a bequest of personal estate, the devisees would have taken estates tail.

And when there was a devise to A. and his heirs, with a gift over if A. should die under twenty-one, *or*, having attained twenty-one, should die without issue, the correspondence between the two events on which the limitation was to take effect, was sufficient to restrain the dying without issue to a failure of issue at the death. (Hawk, 205, 213.)

The words "die without *leaving* issue" occurring in wills made before January 1st, 1874, were equivalent to "die without issue," as regarded real estate; but as regarded personal estate, they meant a failure of issue at the death of the person spoken of, and not an indefinite failure of his issue. (Ib., 213.)

The old law has been abolished by the 32nd section of *The Wills Act of Ontario*, and as regards all wills made or republished on or after January 1st, 1874, the rule is that—

RULE: In devises and bequests of real

or personal estate, the expressions, "die without issue," "die without leaving issue," or any other equivalent words, are construed to mean a failure of issue *at the death* of the person whose issue are spoken of, and not an indefinite failure of his issue, unless an intention appear to the contrary. (R.S. O., 1887, ch. 109, s. 32.)

The 32nd section enacts that "in any devise or bequest of personal estate, the words "die without issue," or "die without leaving issue," or "have no issue," or any other words which import either a want or failure of issue of any person in his lifetime, or at the time of his death, or an indefinite failure of his issue shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention appears by the will, by reason of such person having a prior estate tail, or of a preceding gift being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise; but this Act shall not extend to cases where such words as aforesaid import, if no issue described in a preceding gift be

born, or if there be no issue who live to attain the age, or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue."

By virtue of this section, if real estate be devised to a person and his heirs, or to a person indefinitely, with a limitation over to take effect on the death of that person without issue, or without having or leaving issue, he will not (as before January 1st, 1874), take an estate tail with remainder over, but an estate in fee, with an executory devise over in the event of his death without issue *living at his death.*

And if the devise be to a person for life, with a limitation over on his death without issue, he will not, as before, take an estate tail, but an estate for life only, with the like executory devise over. And if personal estate be given to a person with a bequest over to another upon the death of the former without issue, the gift over will not, as before, be void for remoteness, but will take effect as a contingent executory bequest upon the death of such person without issue living at his death.

Vf. as to the effect of this section, 2 Jarm., 4th ed., 493-496, 532-535.

It is doubtful whether such expressions as "in

default of issue," and "on failure of issue," are within the 32nd section; but as they *may* by force of context "import a want or failure of issue of any person in his lifetime, or at the time of his death," the language of the section may be held to embrace these expressions.

MAITLAND *v.* CHALIE.

RULE: If property, real or personal, be given to the children of A., the shares to vest in them on a given event which has no reference to their surviving A., but there is a gift over on the death of A. without "leaving" a child, etc.,—the word "leaving" will be construed "having" or "having had," in order not to defeat the vested interests which A.'s children who may have predeceased him, may have acquired under the terms of the gift. (*Maitland* v. *Chalie*, 6 Mad. 243; 2 Jarm., 4th ed., 200, 823.)

The rule may be applied to devises of real estate. (2 Jarm., 4th ed., 825.)

CHAPTER XXVIII.

VESTING.

The word "to vest" has several senses which it is important to distinguish:—Originally the word had reference only to real estate. As applied to estates in land, "to vest" signifies the acquisition of a portion of the actual ownership or feudal possession of the land: the acquisition, not of an estate *in possession*, but of an actual estate. The fee simple being supposed to be carved out into parts or divisions by the creation of particular estates, a grant to any person of one of these portions of the fee vested him with, or vested in him an estate in the land. Thus "vested" is nearly equivalent to "possessed."

In this, its original sense, "vested" had no reference to the absence of *conditionalness* or contingency. If an estate tail be limited to A., with remainder to B., the estate of B. is a "vested" remainder, not because the failure of issue of A. is considered an event certain at some time or other to happen, but because

such a remainder vests in B. an actual portion of the fee, though the time of its falling into possession is wholly contingent and uncertain. B. is *invested* with a portion of the ownership of the land.

All remainders, not vested, are in fact contingent, not as being necessarily limited on an uncertain event, but because their taking effect depends on the contingency of their happening to vest during the continuance of the particular estate which supports them, and which may determine at any moment. Thus, "vested" comes to mean the opposite of "contingent" or conditional. But the word itself refers, as has been said, not to contingency but to possession.

The only definition that can be given of the word "vested" in English law, as applied to future interests other than remainders, is, that it means "not subject to a condition precedent." As applied to remainders in land, the word retains its original sense denoting the actual possession of an *estate* in the land. (Hawk, 221-223.)

I.—Personal Estate.

Rule: A bequest of personal estate to A. "at," "on," "upon," or "from and after" a particular age or time confers a contingent

interest: the words, in such a context, being equivalent to "if" the event shall happen. (*Parker* v. *Hodgson*, 30 L.J. Ch. 590; *Bolton* v. *Bailey*, 26 Grant Ch. (U.C.) 361; Wms. Exs., 8th ed., 1237; 1 Jarm., 4th ed., 837; Hawk, 223.)

And where there is a testamentary gift to A., "if," or "when," or "provided," or "in case," or "so soon as" (phrases which are synonymous, *Shrimpton* v. *Shrimpton*, 31 Bea., 425), a certain event happens, *e.g.*, attaining a stated age,—such a gift, standing unaffected by the context, confers only a contingent interest, and requires the happening of the event to give it validity. But with the aid of a context such words may, without difficulty, not defer the vesting of the subject matter of the gift, but merely refer to the futurity of its possession. (1 Jarm., 4th ed., 805, 809, 816, 842, 854, 860; Hawk, 225.)

Where the gift is to a class "*who*," or "*as*," shall attain a certain age, the rule (nearly universally applied) is to regard the attainment of the age as part of the description of the beneficiary, and to construe the gift as contingent, upon the ground that no one could claim who could not predicate of himself that he was of the

age required. (1 Jarm., 4th ed., 817, 818, 854, 860; Hawk, 224.)

And the rule applies where the gift is in the form of a direction to pay. *E.g.*, if the gift be to trustees upon trust for A. for life, and after his decease upon trust to pay and divide among his children *when* they shall respectively attain twenty-one, no child dying under that age will be entitled. (Hawk, 224.)

RULE: In bequests of personal estate, if the *gift* and *direction as to payment* are distinct, the direction as to the time of payment does not postpone the vesting. (1 Jarm., 4th ed., 837; Hawk, 226.)

We have seen that a bequest to A. *at* twenty-one is contingent, but a bequest to A. *payable* at twenty-one, though not differing much in expression, is, under the above rule, vested, and if A. dies under twenty-one, his representatives will be entitled. (Ib.)

And a bequest to the children of A., equally *to be divided* among them when they attain twenty-one, vests in the children at birth. (1 Jarm., 4th ed., 837, 838.)

But where the payment is to be made, not on attaining a given age, *or* marriage, but on marriage only the rule does not apply.

E.g. : A bequest to A. to be paid on his marriage, is contingent. (1 Jarm, 4th ed., 839.) But a bequest to A. to be paid on his marriage, *with interest in the meantime*, is vested. (Ib. 834.)

But though there may be a gift distinct from the direction to pay, the question whether the vesting is to be postponed till the time of payment, or not depends solely upon the intention to be collected from the context in the will. (2 Jarm., 4th ed., 799 to 808.)

RULE : In bequests of personal estate, a gift of the whole interim interest to or for the benefit of the legatee, vests the principal. (1 Jarm., 4th ed., 842.)

And where interest is given to other persons to be applied for the benefit of the legatee, the rule will apply. *E.g.*, a bequest to the children of A. when they attain 21, *the interest* to be applied at the discretion of trustees for their maintenance and education during their minorities, vests in the children at birth. (*Gairdner* v. *Gairdner*, 1 O.R., 184.)

But if a discretionary power is given to the trustees to apply all or any part of the interest towards the maintenance and education or for the benefit of the legatee, it does not vest the principal. (Hawk, 229.)

And a bequest to *such of* the children of A. as shall attain 21, the interest to be applied in the meantime for their benefit does not vest in those under 21. (1 Jarm., 4th ed., 860.)

The rule applies where there is a bequest of interest subject to a charge.

If the gift of the interest itself is contingent on the legatee attaining a specified age, so that the interest is to follow the fate of the principal, it will not vest the principal. (1 Jarm., 4th ed., 847.)

But even if the interest be not given to the legatee till he attains the specified age, yet if the subject matter of the bequest be at once severed from the rest of the testator's property, and given to trustees for the legatee in trust to accumulate until the legatee attains the specified age, an inference in favor of immediate vesting arises. (1 Jarm., 4th ed., 848.)

Hallifax *v.* Wilson.

A bequest to A. "from and after" his attaining 21 is contingent; but a bequest to A. "from and

after" the death of B., following a gift to B. of a life interest in the fund, is vested; for—

RULE: A bequest in the form of a direction to pay, or to pay and divide, at a future period, vests immediately, if the payment be postponed for the convenience of the estate, or to let in some other interest. (*Hallifax* v. *Wilson*, 16 Ves., 171; *Webster* v. *Leys*, 28 Grant, Ch. [U.C.] 475.)

E.g: Under a bequest to trustees in trust for A. during his life, and after his death to pay and divide among his children, the shares of children dying in the lifetime of A. are vested, and pass to their representatives. (1 Jarm., 4th ed., 840.)

LEEMING V. SHERRATT.

RULE: A bequest to the children of A. *when the youngest child attains twenty-one*, vests in all the children who attain twenty-one, to the exclusion of those dying under twenty-one. (*Leaming* v. *Sherratt*, 2 Hare, 14; *Stinson* v. *Stinson*, 21 Grant Ch. [U C.] 116; 1 Jarm, 4th ed., 861, 862.)

A gift of the interest of the fund to be applied for the maintenance and education of *all* the children during their minorities does not exclude the rule. (*Bigelow* v. *Bigelow*, 19 Grant Ch. [U.C.] 549.)

The rule does not apply if the bequest be not to a class but to named individuals. (1 Jarm., 4th ed., 862.)

II. Legacies Charged on Land.

Rule: Legacies or portions charged on real estate do not vest until the time appointed for payment of them, unless an intention appear to the contrary, but upon the death of the legatee or portioner before that time, lapse and sink into the inheritance. (Hawk, 234, 235.)

The difference between legacies payable at a future time out of real estate, and those payable at a future time out of personal estate must be noticed. In the former case they are contingent; in the latter case, we have seen that the time for payment does not affect the vesting. And the rule is the same even if interest be given in the meantime. (Wms. Exs., 8th ed., 1237.)

But the context may show that it was the intention of the testator that the legacy should vest at an earlier period.

If the payment of the legacy or portion is postponed simply for the convenience of the estate, the legacy or portion may vest, notwithstanding the death of the legatee or portioner before the time appointed for payment. (1 Jarm., 4th ed., 834; Theobald, 3rd ed , 381; Hawk, 235, 236; and V. *Pollard* v. *Hodgson,* 22 Grant Ch. [U.C.] 287.)

If a legacy is charged upon real and personal estate, the personal estate is the primary fund for payment, and so far as the personal estate extends, the vesting is governed by the rules applicable to personal estate; and so far as the real estate has to be resorted to, by the rules relating to legacies charged real estate. (Theobald, 3rd ed., 381.)

As land directed to be converted into money is invested with all the properties of money (Lewin, 8th ed., 949), so a legacy payable out of the proceeds of land directed to be sold is governed by the rules relating to bequests of personal estate, and not by those relating to legacies charged on land.

III. Real Estate.

All estates are held to be vested, except estates

in the devise of which a condition precedent to the vesting is so clearly expressed that the Courts cannot treat them as vested without deciding in direct opposition to the terms of the will. (*Duffield* v. *Duffield*, 1 Dow. & Cl., 311.)

In order to accomplish this, (1) words of seeming condition are, if possible, held to have only the right of postponing the right of possession; and (2) if the devise be clearly conditional, the condition will, if possible, be construed as a condition subsequent and not precedent, so as to confer an immediately vested estate, subject to be divested on the happening of the contingency.

1. Boraston's Case.

Rule: If real estate be devised to A. "when" he shall attain a given age, and until A. attains that age the property is devised to B., A. takes an *immediate vested estate, not defeasible on his death under the specified age;* the gift being read as a devise to B. for a term of years, with *remainder* to A. (*Boraston's Case*, 3 Rep., 19a.; *Marcon* v. *Alling*, 5 Grant Ch. [U C.] 562; 1 Jarm., 4th ed., 805.)

The rule is the same if the words "at," "upon," "from and after" are used in place of "when."

But the rule will not apply if the word "if" be used.

And a devise to A. "if" he be living at a certain time, would be contingent. (*Merchants Bank* v. *Keefer*, 5 C.L.T., 66.)

2. EDWARDS *v* HAMMOND.

RULE: If real estate be devised to A. "if," or "when," he shall attain a given age, with a limitation over in the event of his dying under that age, the attainment of the given age is held to be a condition subsequent and not precedent, and A. takes an immediate vested estate, subject to be divested upon his death under the specified age. *Edwards* v. *Hammond*, 1 B. & P.N.R., 324n; *Keefer* v. *McKay*, 29 Grant Ch. [U.C.] 162; 1 Jarm., 4th ed., 809, 810.)

And if the devise be to A. if or when he shall attain a given age, with a limitation over upon his death under that age *without issue*, A. takes a vested estate,

defeasible only in the event of his death without issue under the specified age. *Holtby* v. *Wilkinson*, 28 Grant Ch. [U.C.] 550.)

The rule is the same if the words "at," "upon," or "from and after" be used in place of "if" or "when."

The rule is the same where the devise is to a class. *E.g.*, under a devise to the children of A. when they attain twenty-one, with a gift over in default of children who should attain twenty-one, the estates of the children vest at birth. (1 Jarm., 4th ed., 810.)

CHAPTER XXIX.

SUBSTITUTION, SURVIVORSHIP, ETC.

Substitution.

The term "substitution" is generally applied to limitations intended to provide for the death of prior legatees before the period of distribution. (Theobald, 3rd ed., 457.)

Rule: Wherever there is a bequest, whether immediate or deferred, to *individuals* by name, substitution may take place before the testator's death, and a gift over of the *legacy* or *share* of a legatee dying under certain circumstances, takes effect if the event happens in the testator's lifetime. (*Willing* v. *Baine*, 3 P. Wms., 113; 2 Jarm., 4th ed., 762, 763.)

E.g.: If there be a bequest to A. for life, and after

his death equally between B. and C. with a gift over of the share of either dying in the lifetime of A., and B. or C., dies in the lifetime of A. during the testator's lifetime, the gift over takes effect.

And if the bequest be to A., and if he dies under twenty-one to B., if A. dies *under* twenty-one, in the lifetime of the testator, the gift over takes effect. (Theobald, 3rd ed., 448.)

And substitution will take place, in the case of a bequest to individuals, if the legatee is dead (under the circumstances prescribed in the will) at the date of the will, the testator being presumed to have made the bequest on the supposition that he was alive. (Hawk, 245; Theobald, 3rd ed., 460.)

A gift to A. and in case of his death to his *executors or administrators*, will go to A's executors in the event of his death before the testator. (Theobald, 3rd ed., 268.)

But where there is a future gift to A. or his executors and administrators, the word executors will be treated as inserted to provide for the death of the donee before the time of vesting in possession. (Ib.)

Executors taking substitutionally take the property to be administered as part of the assests of the original legatee. (Ib.)

But where the gift over is to the persons *beneficially* entitled in case of intestacy, as to A. for life, and after his death to "B. *or his heirs,*" the word heirs being construed to mean the persons entitled under the Statute of Distributions, the gift over, although the bequest is not immediate, takes effect if B. dies in the testator's lifetime, or in the lifetime of the tenant for life. (*Re Porter's Trusts,* 4 K. & J., 188; Theobald, 3rd ed., 459.)

A bequest to A. to be paid at the end of a year from the testator's death, *or* to his representatives, is not an immediate gift, and therefore if A. dies in the testator's lifetime, substitution will not take place. (Hawk, 247.)

The rule as to substitution does not apply to a bequest to a class, and the gift over is construed as a gift only of the shares of *members of the class.* In this case substitution cannot take place until the period when the class is ascertained which cannot be in the testator's lifetime. (Hawk, 247: Theobald, 3rd ed., 460.)

If the gift is substitutional, as to several or their children, the children take *per stirpes.* (Theobald, 3rd ed., 240.)

RULE: Where there is an immediate be-

quest to A. and a gift over "*in case of his death*," or any similar expression implying the death to be a contingent event, the gift over will take effect only in the event of A's death *before the period of payment*, *i.e.*, before the testator, and A. surviving the testator takes absolutely. (*Cambridge* v *Rous*, 8 Ves., 12; *Elliott* v. *Smith*, 22 Ch. D. 236; 2 Jarm., 4th ed., 752.)

And if there is a gift to "A. or his issue" it is equivalent to a gift to A. and "*in case of his death*" to his issue, and will come under above rule. (Hawk, 255.)

And a bequest to A. or his issue, to be paid *at* the *end of twelve* months from the testator's death, is an immediate bequest; and the legatee, if he survives the testator, takes absolutely. (Ib.)

And where there is a bequest to "A. *or* his personal representatives," or to "A. *or* his heirs," the word "or," generally speaking, implies a substitution so as to prevent a lapse. (Wms. Exs., 8th ed., 1215, 1216.) Secus, where the gift is to "A. *and* his executors, administrators and assigns." (Ib., 1212.); but when to "A. *and his heirs*," there is no lapse. (Ib., 1213.)

In the case of realty a devise to A. simply, before 1874, and in case of his death over would give A. an estate for life, and after his death over. (Theobald, 3rd ed., 451.) But now, by virtue of section 30 of *The Wills Act of Ontario*, the gift over will only take effect if A. predecease the testator.

If the devise gives A. the fee, a gift over, in case of A's death, will be held to refer to his death before the testator. (*Rogers* v. *Rogers*, 7 W. R., 541.)

If the devise or bequest confers a life estate, or a time is appointed for payment of the bequest, the words "in case of death" refer to the death at any time before the vesting in possession, whether before or after the testator. (Theobald. 3rd ed., 451.)

Where there is a gift to A. (whether preceded or not by a life estate) and if he shall die *without leaving a child*, or *without leaving issue* (as the case may be), then to B., that means, if, *at any time*, A. should die without leaving a child, the gift over to B. will take effect. (*Edwards* v. *Edwards*, 21 L.J., Ch. 324; 15 Bea. 357; *O'Mahoney* v. *Burdett*, 44 L. J., Ch. 56n; L.R. 7, H.L. 388.)

If a devise is followed by words of limitation or benefit, as "to A., his heirs, and assigns," or "to A. for ever," or "to A. for his own use and benefit," and

the property is then given over upon contingencies, one or other of which must happen; as, for instance, upon death either with or without children, the defeasibility will be limited by the period of distribution, whether it is the testator's death or some other time, in order not to cut down the previous absolute interests to life interests merely. (Theobald, 3rd ed., 454; Hawk, 259.)

But if the devise be without words implying an absolute interest, the fact that the contingencies upon which the property is given over, in effect reduce the interest to a life interest, will not have the effect of confining the happening of the contingencies to the period of distribution. (Theobald, 3rd ed., 454.)

Survivorship.

The word "*survivor*" may be either a word of limitation of an estate (denoting the interest certain persons are to take), or it may denote the persons who are to take, in which case it must have its natural meaning "to outlive;" *i.e.*, to be alive at and after the time of a particular event or death of a particular person, which event or person the other is to survive. (Theobald, 3rd ed., 466.)

In a devise to A., B., and C. as tenants in common

for life, with benefit of survivorship, the word survivorship refers to the extent of the estate and not to the class of persons, and upon the death of one the remaining tenants in common take the whole estate. *Haddelsey* v. *Adams*, 22 Bea., 266; *Taafe* v. *Conmee*, 10 H.L., 64.)

The Period of Division.

CRIPPS v. WOOLCOTT.

RULE: In bequests of personal estate, words of suvivorship are *primâ facie* to be referred to the period of payment or distribution, and not to the death of the testator. (*Cripps* v. *Woolcott*, 4 Mad. II; *Hannah* v. *Duke*, 16 Ch. D., 112; 2 Jarm., 4th ed., 733.)

E.g., a gift to A, for life, and after his death to his *surviving* children, "surviving" is construed to mean "living at the death of A."

Survivorship is to be referred to the period of division. If there is no previous interest given in the legacy, then the period of division is the death of the testator, and the survivors at his death will take the whole legacy. But if a previous life estate be given, then the period of division is the death of the tenant

for life, and the survivors at such death will take the whole legacy. (Theobald, 3rd ed., 471; 2 Jarm., 4th ed., 733.)

But if the tenant for life dies in the lifetime of the testator, the survivors are fixed at the testator's death. (2 Jarm., 4th ed., 736; Theobald, 3rd ed., 471.)

The same rule applies to realty as to personalty. (Ib.)

The rule may be excluded by a contrary intention. (V. Theobald, 3rd ed., 472-474; 2 Jarm., 4th ed., 737, 738.)

RULE: A bequest to several, or to a class, "*or*" to such of them as shall be living at a given period, is construed as a vested gift to all, subject to be divested in favor of those living at that period, if there be such; and if none are then living, all are held to take, and their shares will devolve to their respective representatives. (*Browne* v. *Kenyon*, 3 Mad., 410; *Sturgess* v. *Pearson*, 4 Mad., 411; 1 Jarm., 4th ed., 827, 828.)

E.g.: If the gift be to A. for life, and after his decease to his children *or the survivors*, and no child is

living at the death of A., all the children are entitled, as if the gift had been given to A. for life, with remainder to his children simply.

It is the same if the gift be to A. for life, with remainder to his children *or such of them as shall be living* at his death.

Accrued Shares.

RULE: A clause of accruer of the shares of devisees or legatees does not without a positive and distinct indication of intention, operate on shares which have already accrued under the clause in question. (*Ex. parte West*, 1 Bro. C.C., 575; 2 Jarm., 4th ed., 710.)

The meaning of this rule is, that clauses in a will disposing of the shares of devisees and legatees dying before a given period or event, do not, without a positive and distinct indication of intention, extend to shares which have once accrued under those clauses so as to pass them a second time. (Theobald, 3rd ed., 478.)

E.g.: If real or personal estate be given to A., B., and C., as tenants in common with a direction that

if any of them die without issue, the *share* of the one so dying shall be divided among the *survivors:* if A. and B. successively die without issue, the original share of B. will accrue to C., but not the share which accrued to B. upon the death of A.

But accrued shares will go with the original shares if there is an intention expressed that they should do so.

If, for instance, accrued shares are directed to go in the same manner as original shares; or, where the testator uses words which are applicable to accrued shares, as if he speaks of "his or her share or shares" where only one original share has been previously given, so that the words cannot be satisfied *reddendo singula singulis*; or, where the testator, though he speaks of individual shares, yet shows that he looks on the fund as existing at the period of distribution as an aggregate and previously undivided fund by speaking of it, for instance, as the trust fund; and a gift over of the whole fund is convincing evidence of the same intention; and where the gift is of residue, the presumption against intestacy will assist the Court in passing accrued with original shares. (Theobald, 3rd ed., 479, 480; 2 Jarm., 4th ed., 712, *et seq.*)

CHAPTER XXX.

CHARGES, LIABILITY TO DEBTS, ETC.

Dower.

Every devise of land liable to dower takes effect subject to the widow's right in that respect.

The *class* or species of property upon which the right to dower may attach, and the *estate* or degree of interest which must exist therein as a requisite to its inception, should be distinguished. For instance, all *real* hereditaments, whether corporeal or incorporeal, are subject to dower (unless there is a special reason to the contrary), but it is not to every *estate* or interest therein that dower will attach. (Cameron, 66, 68.)

Thus, an estate for life is not subject to dower at Common Law; (Cameron, 66.) Nor is dower allowed out of estates in remainder or reversion. (Cameron, 80.)

The estate of the husband must confer a right to

the immediate freehold, and must be one that the issue of the wife, if any, could inherit; but it is not necessary that any issue should be actually born. (Cameron, 77.)

As regards dower in estates equal to estates of inheritance it is enacted that " where a husband dies beneficially entitled to any land for an interest which does not entitle his widow to dower at Common Law, and such interest whether wholly equitable, or partly legal and partly equitable, is an estate of inheritance in possession, or equal to an estate of inheritance in possession, (other than an estate in joint tenancy), then his widow shall be entitled to dower out of the same land. (R.S.O., 1887, c. 133, s. 1.).

Section 3 of the Dower Act enacts that the widow shall not be entitled to dower in any land, which at the time of the alienation thereof by the husband, or at the time of his death, if he died seised thereof, was in a state of nature, and unimproved by clearing, fencing, or otherwise, for the purposes of cultivation or occupation. (R.S.O., 1887, c. 103, s. 3.)

Where the husband is seised as tenant in common of real estate, his widow is entitled to dower therein. (*Ham* v. *Ham*, 14 Q.B., 497.)

But the widow has no right to dower where the

estate is one of joint tenancy, for on his death during the joint seisin the title passes to the other joint tenant or tenants free from dower. (*Haskill* v. *Fraser*, 12 C.P., 383.)

Section 4 of the Dower Act abolishes dower *ad ostium ecclesiæ*, and dower *ex assessu patris*.

Where the will indicates an intention to dispose of the lands *adversely* to her right, the widow, if taking any benefits under the will, is put to her election; but unless it shows a clear intention that the provision is to be in satisfaction of dower, or the provision made therein is wholly inconsitent with the enjoyment of dower, she will not be put to her election. (Cameron, 481.)

And when a will expressly declares that what is is given to the widow is intended to be in lieu of dower, she is, if she accepts it, bound by her election and her claim to dower is barred. (*Walton* v. *Hill*, 8 Q. B., 562.)

Mortgages.

By *The Wills Act of Ontario* (R.S.O., 1887, c. 109, section 37), it is enacted that "where any person has died since the 31st day of December, 1865, or hereafter dies seised of or entitled to any estate or interest

in any real estate, which, at the time of his death was or is charged with the payment of any sum or sums of money by way of mortgage and such person has not, by his will or deed or other document, signified any contrary or other intention, the heir or devisee to whom such real estate descends or is devised shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate, or any other real estate of such person; but the real estate so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same is charged, every part therefore according to its value bearing a proportionate part of the mortgage debts charged on the whole thereof." Provided that "nothing herein contained shall affect or diminish any right of the mortgagee on such real estate to obtain full payment or satisfaction of his mortgage debt, either out of the personal estate of the person so dying as aforesaid, or otherwise; and nothing herein contained shall affect the rights of any person claiming under or by virtue of any will, deed, or document made before the first day of January, 1874." The effect of this enactment is to make the mortgaged estate, as between the persons claiming

under the testator, primary liable, *in the absence* of any intention on the part of the testator appearing to the contrary, evidenced either by will or *any document.* It is sufficient, in order to exonerate the mortgaged estate, that it should be specifically devised without mention of the mortgage, and another fund, whether real or personal, designated for payment of debts generally. (2 Jarm., 4th ed., 647; Hawk, 280.)

Debts and Legacies.

Implied Charge of Debt.

Rule: A direction by the testator that his debts shall be paid, charges all his real estate therewith. (*Shallcross* v. *Finden*, 3 Ves., 738; 2 Jarm., 4th ed., 590, 591; Hawk, 282.)

But a direction by the testator that his debts shall be paid *by his executors*, charges only the real estate, if any, devised to them. (2 Jarm., 4th ed., 594, 595; Hawk, 282.)

It is not material whether the real estate is devised to the executors as trustees or beneficially.

If the testator devises all his real estate to his

executors and directs them to pay his debts, that constitutes a charge on the real estate, even if they take no beneficial interest in it. (*Robson* v. *Jardine*, 22 Grant Ch. [U.C.] 420; 2 Jarm., 4th ed., 596; Hawk, 284.)

But the property must be derived by them jointly under the will, for a direction to the executors to pay debts does not charge lands devised to one of them only. (2 Jarm., 4th ed., 598; Hawk, 284, 285.)

Exoneration of Personalty.

RULE: "The charging the real estate ever so anxiously is not of itself sufficient to exempt the personal estate." (*Tait* v. *Northwick*, 4 Ves, 823; Hawk, 287.)

There must be, in order to exonerate the personal estate, a clear intention on the part of the testator, not only to *charge* the real estate, but to *discharge* the personal estate. (2 Jarm., 4th ed., 657, 660.)

A direction to *sell* the real estate for payment of debts would not be sufficient. (2 Jarm., 4th ed., 668; Hawk, 286.)

But where provision has been made for the payment of all those charges, which would primarily

affect the personal estate, out of the real estate, and the whole personal estate has been *specifically* given, the rule is excluded. (*Scott* v. *Scott*, 18 Grant Ch. [U.C.] 66.)

Legacies and annuities given generally, without reference to any particular fund, are primarily payable out of the personal estate, and the rule as to exoneration applies to them.

But where there is a reference to the funds or property on which they are charged, the rule does not apply, and the funds so pointed out are primarily or solely liable. (2 Jarm, 4th ed., 673, 674).

Blended, Real and Personal Estate.

Mixed, real, and personal estate may be disposed of in three ways by will.

1. The two may be given together, but retaining their several qualities; in which case the liability as to charges is not affected.

2. The real estate may be converted, and the proceeds given along with the personal estate; which places the real and personal estate on an equality, as regards those charges to which both are liable.

3. The real estate may be converted, and the pro-

ceeds declared *to be part* of the personal estate, and disposed of as such; in which case the real estate is subject to the charges affecting the personal estate.

ROBERTS *v.* WALKER.

RULE: "When a testator creates from real estate and personal estate a mixed and general fund, and directs the whole of that fund to be applied for stated purposes, (*E.g.*, the payment of debts, legacies, or annuities); he does, in effect, direct that the real and personal estate which have been converted into that fund shall answer the stated purposes and every of them pro rata, according to their respective values." (*Roberts* v. *Walker*, 1 R. & My., 752; 2 Jarm., 4th ed., 627.)

But if real and personal estate are given together subject to charges, but the real estate *is not directed* to be sold, the personal estate remains primarily liable. (2 Jarm., 4th ed., 629; Hawk, 291.)

The rule in *Roberts* v. *Walker* applies not only to those charges which are *expressly* directed to be paid

out of the mixed funds, but to all charges to which both funds are liable.

KIDNEY *v.* COUSSMAKER.

RULE: A direction that real estate shall be sold, and the proceeds form or be considered as *part of* the residuary personal estate of the testator, subjects the real estate to all charges affecting the personal estate. (*Kidney* v. *Coussmaker*, 1 Ves. jun., 436; 2 Jarm., 4th ed., 601; Hawk, 293.)

And the real and personal estate are liable to the charges *pari passu*. (Hawk, 293.)

The rule in *Kidney* v. *Coussmaker* applies to legacies as well as to debts; although the personalty is not in terms charged with the payment of them. (2 Jarm, 4th ed., 603.)

GREVILLE *v.* BROWNE.

RULE: If legacies are given generally, and the *residue* of the real and personal estate is afterwards given in one mass *E.g.*, "all the rest residue and remainder of any

property I might die possessed of or entitled to of what nature soever"—the legacies are a charge on the residuary real as well as the personal estate. (*Greville* v. *Browne*, 7 H.L.Ca., 689; 2 Jarm, 4th ed., 605; Hawk, 294.)

But where the testator plainly treats the different species of estates as two masses, as in the case of a gift (after legacies) of "all my real estate and all the residue of my personal estate," the rule does not apply. (2 Jarm, 4th ed., 607.)

And the rule is not applicable to a case where the testator first dealing exclusively with his personal estate allots certain portions of it to several objects, and then disposes of the residue of his real and personal estate. (Ib)

And where a charge of legacies is effected under the rule in *Greville* v. *Browne*, and there is also a specific devise of realty, the latter is not charged with the legacies but only the residuary realty. (Ib. 609.)

COUROU *v.* COUROU.

RULE: A mere charge of legacies on the real and personal estate, or on *all* the real

and personal estate, does not of itself create a charge on any specific devise or bequest. (*Courou* v. *Courou*, 7 H. L. Ca., 168; 2 Jarm., 4th ed., 608; Hawk, 296,)

But if the specific devise failed, so that the lands fell into the residue, they would of course be charged.

Where debts and legacies are charged together, the legacies, being placed by the will on an equal footing with the debts, which are a charge on lands specifically devised, get the benefit of the charge on the specifically devised estates. (2 Jarm., 4th ed., 609.)

CHAPTER XXXI.

LEGACIES.

RULE: The term "Legacies" includes annuities, and "Legatee" includes annuitant. (*Ward* v. *Grey*, 29 L.J. Ch. 75, 76; 26 Bea., 485; 2 Jarm, 4th ed., 609; Wms. Exs., 8th ed., 1202n; Theobald, 3rd ed., 148; Hawk, 298.)

And the term "pecuniary legacies" would also, it would seem, include annuities. (Theobald, 3rd ed., 148.)

But if the testator expressly distinguishes between legatees and annuitants, legacies will not include annuities. (Ib.)

And annuities not given simpliciter, but as rent charges payable solely or primarily out of the real estate, do not fall under the term legacies. (Hawk, 299.)

CHANCEY'S CASE.

Where a testator bequeaths to a creditor a sum,

equal to or *greater than* the amount of his debt, absolutely, a "presumption" of law arises that the debt was intended to be satisfied by the legacy. But—

RULE: A direction by the testator that his *debts and legacies* should be paid, is sufficient to rebut the presumption that a debt is satisfied by a legacy. (*Chancey's Case*, 1 P. Wms, 408; Theobald, 3rd ed., 547; Hawk, 299.)

It seems doubtful whether a direction to pay "debts" only will have the effect of rebutting the presumption of satisfaction.

LEGACY OF STOCK NOT SPECIFIC.

Rule: A legacy of stock, of whatever denomonation, is not specific, but is a general legacy; although the testator may have had stock of the description mentioned sufficient to answer the bequest. (Theobald, 3rd ed., 99; Hawk, 301.)

But a reference to particular stock will exclude the rule. E.g., the word "*my*" is sufficient to render the legacy specific. (Theobald, 3rd ed., 100.)

And a direction to transfer a certain amount of stock, or to pay it as soon as possible, will not make the legacy specific. (Ib.)

Repeated Legacies.

RULE: Legacies of the same amount given by the same instrument to the same person are merely repetitions and the legatee is entitled to one legacy only. (*Holford* v. *Wood*, 4 Ves., 75: *Edwards* v. *Pearson*, 4 O.R., 516; Theobald, 3rd ed., 108.) But if the repetitions occur in different instruments, as in a will and codicil, the legacies are cumulative, and the legatee is entitled to both. (Theobald, 3rd ed., 108, Hawk, 303.)

And if the legacy given by one instrument is of less or greater amount than the one given by the other instrument, they are, *prima facie* cumulative. (Theobald, 3rd ed., 108; Hawk 304.)

Legacies by two instruments substitutional.—It may, however, appear that the gift by the later instrument is intended to be substitutional. This may be shewn:

1. By the form of the second instrument; as, for instance, where the instrument by which the second gift is made is not a codicil, but is described as a last will and testament; or, where the additional instrument recites that the testator has not had time to alter his will; or, where the additional instrument is treated as explanatory of and to be incorporated into the will.

2. From the contents of the second paper; as, for instance, when the second paper is not a codicil but a testamentary paper, and, in effect, makes the same dispositions as a prior testamentary paper.

3. And it may appear from the terms and character of the second gift itself that it is meant to be substitutional. (Theobald, 3rd ed., 108, 109.)

Repetition of a series of legacies.—And where a series of legacies given by one testamentary instrument is repeated in another, with slight variations or additions, the similarity of the two sets of gifts may show that the second instrument, *as a whole*, is intended as a substitution for, and not an addition to, the first. (Hawk, 305.)

If gifts are given by different instruments, of the *same amount* and expressed to be given from the

same motive, a "presumption" of law is raised that they are substitutional. (*Benyon* v. *Benyon*, 17 Ves., 34; Theobald, 3rd ed., 111; Hawk, 305.)

Parol evidence is not admissible to controvert a rule of construction, but it is admissible for the purpose of rebutting a presumption.

LEACROFT *v.* MAYNARD.

RULE: An *added* or substituted legacy is subject to the same conditions as the original gift with respect to vesting, separate estate, the fund out of which it is payable, freedom from legacy duty, and provisions against lapse. (*Leacroft* v. *Maynard*, 1 Ves. Jun., 279; 3 B.C.C., 233; Theobald, 3rd ed. 111; Hawk, 308.)

E.g.: If the testator by will gives to A. $500 free of legacy duty, and by a codicil gives to A. $1.000 *in lieu of*, or, *in addition to*, the legacy given by the will, the bequest made by the codicil is also free of legacy duty.

The rule does not apply where a legacy is given to a person in lieu of a legacy to another legatee who has pre-deceased the testator. (*Chatteris* v. *Young*, 2 Russ., 184.)

Nor does it apply where the condition in question is limited by the will to legacies "hereinafter" given and the additional legacy is given by a codicil. *Bonner* v. *Bonner*, 13 Ves., 379.)

And where an intention appears to revoke the prior disposition *in toto*, not merely altering the amount given, but sweeping away the original legacy with its incidents and conditions, and substituting an entirely new gift, although expressly given in lieu of the former. (*Alexander* v. *Alexander*, 5 Bea., 518.)

And an additional legacy given in terms which would give an absolute interest is not subject to limitations of the prior gift, which would cut it down to a life interest. (*Haley* v. *Bannister*, 23 Bea., 336.)

RULE: A general or specific legacy given by a testator to his executor, or executors, whether under the title of executors or not, is *prima facie* given to them in that character, and is conditional on his, or their, accepting the office. (*Reed* v. *Devaynes*, 2 Cox, 285; Theobald, 3rd ed., 268; Hawk, 309.)

The rule does not apply where the testator ex-

presses some motive, other than that expressed by a gift to his executor as such, as if the gift is to "my friend and executor." (Theobald, 3rd ed., 269.)

Neither does it apply where the gift is after a life interest; nor where there is a direction that in the event of the executor's death before the testator, his legacy is to go to his next of kin; nor where the gift is of residue. (Ib.)

ELCOCK *v.* MAPP.

RULE: If the residuary personal estate is given to trustees, and the trustees are also executors, they cannot as executors claim any part of the residue beneficially. (*Elcock* v. *Mapp*, 3 H.L.C., 492; *McDonald* v. *McDonald*, 34 U.C., Q.B., 369.)

And where only one, or some, of the executors is, or are, expressly declared by the will to be a trustee, all the executors are trustees, and the rule applies.

APPENDIX.

The Wills Act of Ontario.

R. S. O. 1887, c. 109.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario enacts as follows :—

1. This Act may be cited as "*The Wills Act of Ontario.*"

Wills before 1st January, 1874.

2. In the next succeeding three sections of this Act the word "land" shall extend to messuages, and all other hereditaments, whether corporeal or incorporeal, and to money to be laid out in the purchase of land, and to chattels and other personal property transmissible to heirs, and also to any share of the same hereditaments and properties, or any of them, and to any estate of inheritance, or estate for any life or lives, or other estate transmissible to heirs, and to any

possibility, right or title of entry or action, and any other interest capable of being inherited, and whether the same estates, possibilities, rights, titles and interests, or any of them, are in possession, reversion, remainder or contingency.

3. Where a will made before and not re-executed, republished or revived after the first day of January, 1874, by any person dying after the sixth day of March, 1834, contains a devise in any form of words of all such real estate as the testator dies seised or possessed of, or of any part or proportion thereof, such will shall be valid and effectual to pass any land acquired by the devisor after the making of such will, in the same manner as if the title thereto had been acquired before the making thereof.

4. Where land is devised in any such will as aforesaid, it shall be considered that the devisor intended to devise all such estate as he was seised of in the same land, whether in fee simple or otherwise, unless it appears upon the face of such will that he intended to devise only an estate for life, or other estate less than he was seised of at the time of making the will containing such devise.

5. Any will affecting land executed after the sixth

day of March, 1834, and before the first day of January, 1874, in the presence of and attested by two or more witnesses, shall have the same validity and effect as if executed in the presence of and attested by three witnesses; and it shall be sufficient if the witnesses subscribed their names in presence of each other, although their names were not subscribed in presence of the testator.

6. After the fourth day of May, 1859, and before the first day of January, 1874, every married woman might, by devise or bequest executed in the presence of two or more witnesses, neither of whom was her husband, make any devise or bequest of her separate property, real or personal, or of any rights therein, whether such property was acquired before or after marriage, to or among her child or children, issue of any marriage, and failing there being any issue then to her husband, or as she might see fit, in the same manner as if she were sole and unmarried.

WILLS AFTER 1ST JANUARY, 1874.

7. Unless herein otherwise expressly provided, the subsequent sections of this Act shall not extend to any will made before the first day of January, 1874; but every will re-executed or re-published, or revived by

any codicil, shall, for the purposes of the said sections, be deemed to have been made at the time at which the same was so re-executed, republished or revived.

8. Sections 20, 21, 22, 25 and 26 of this Act shall not apply to the will of any person who was dead before the first day of January, 1869, but shall apply to the will of every person who has died since the thirty-first day of December, 1868, or who dies after the passing of this Act.

9. In the construction of the sections numbered 10 to 38 inclusive in this Act.

1. "Will" shall extend to a testament, and to a codicil, and to an appointment by will, or by writing in the nature of a will in exercise of a power, and also to a disposition by will and testament, or devise of the custody and tuition of any child, by virtue of the Act passed in the twelfth year of the reign of King Charles the Second, entitled "*An Act for taking away the Court of Wards, and liveries and tenures* in capite, *and by knight's service and purveyance, and for settling a revenue upon His Majesty in lieu thereof,*" and to any other testamentary disposition;

2. "Real estate" shall extend to messuages, lands,

rents, and hereditaments, whether freehold or of any other tenure, and whether corporeal, incorporeal, or personal, and to any undivided share thereof, and to any estate, right, or interest (other than a chattel interest) therein ;

3. "Personal estate" shall extend to leasehold estates and other chattels real, and also to moneys, shares of government and other funds, securities for money (not being real estates), debts, choses in action, rights, credits, goods, and all other property whatsoever which by law devolves upon the executor or administrator, and to any share or interest therein ;

4. "Mortgage" shall include any lien for unpaid purchase money, and any charge, incumbrance, or obligation of any nature whatever upon any lands or tenements of a testator or intestate.

10. Every person may devise, bequeath, or dis ose of by will executed in manner hereinafter mentioned, all real estate and personal estate to which he may be entitled, at the time of his death, and which, if not so devised, bequeathed, or disposed of, would devolve upon his heir at law, or upon his executor or administrator ; and the power hereby given shall extend to estates *pur autre vie,* whether there be or be not any

special occupant thereof, and whether the same be a corporeal or incorporeal hereditament; and also to all contingent, executory, or other future interests in any real or personal estate, whether the testator be or be not ascertained as the person or one of the persons in whom the same may respectively become vested, and whether he be entitled thereto under the instrument by which the same were respectively created, or under any disposition thereof by deed or will, and also to all rights of entry for conditions broken and other rights of entry, and also to such of the same estates, interests and rights respectively, and other real and personal estate, as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will.

11. No will made by any person under the age of twenty-one years shall be valid.

12.—(1) No will shall be valid unless it is in writing, and executed in manner hereinafter mentioned: that is to say, it shall be signed at the foot or end thereof by the testator, or by some other person in his presence, and by his direction; and such signature shall be made or acknowledged by the testator, in

the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator; but no form of attestation shall be necessary.

(2.) Every will, so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, shall be deemed to be valid, within the meaning of this Act, if the signature is so placed, at, or after, or following, or under, or beside, or opposite to the end of the will, that it is apparent on the face of the will that the testator intended to give effect by such signatnre to the writing signed as his will: and no such will shall be affected by the circumstance that the signature does not follow or is not immediately after the foot or end of the will, or by the circumstance that a blank space intervenes between the concluding word of the will and the signature, or by the circumstance that the signature is placed among the words of the *testimonium* clause, or of the clause of attestation, or follows or is after or under the clause of attestation either with or without a blank space intervening, or follows, or is after, or under, or beside the names or one of the names of the subscribing witnesses, or by the circumstance that the signature is on a side, or page, or other

portion of the paper or papers containing the will, whereon no clause or paragraph or disposing part of the will is written above the signature, or by the circumstance that there appears to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature; and the enumeration of the above circumstances shall not restrict the generality of the above enactment: but no signature under this Act shall be operative to give effect to any disposition or direction which is underneath, or which follows it, nor shall it give effect to any disposition or direction inserted after the signature was made.

13. No appointment made by will, in exercise of any power, shall be valid, unless the same is executed in manner hereinbefore required; and every will executed in manner hereinbefore required, shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it has been expressly required that a will made in exercise of such power shall be executed with some additional or other form of execution or solemnity.

14. Any soldier being in actual military service,

or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the passing of this Act.

15. Every will executed in manner hereinbefore required shall be valid without any other publication thereof.

16. If any person who attests the execution of a will is, at the time of the execution thereof, or becomes at any time afterwards, incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid.

17. If any person attests the execution of any will, to whom, or to whose wife or husband, any beneficial devise, legacy, estate, interest, gift, or appointment of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts) is thereby given or made, such devise, legacy, estate, interest, gift, or appointment, shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such

will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will.

18. In case by any will any real or personal estate is charged with any debt or debts, and any creditor, or the wife or husband of any creditor whose debt is so charged attests the execution of such will, such creditor, notwithstanding such charge, shall be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof.

19. No person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof.

20. Every will shall be revoked by the marriage of the testator, except a will made in the exercise of a power of appointment where the real or personal estate thereby appointed would not, in default of such appointment, pass to the testator's heir, executor, or administrator, or the person entitled as the testator's next of kin under the Statute of Distributions. *See section 8 of this Act.*

21. No will shall be revoked by any presumption of an intention, on the ground of an alteration in circumstances. *See section 8 of this Act.*

22. No will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same, by the testator, or by some person in his presence and by his direction, with the intention of revoking the same: *See section 8 of this Act.*

23. No obliteration, interlineation or other alteration made in any will after the execution thereof, shall be valid or have any effect, except so far as the words or effect of the will before such alteration are not apparent, unless such alteration is executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed, if the signature of the testator and the subscription of the witnesses are made in the margin or in some other part of the will opposite or near to such alteration, or at the foot or end of, or opposite to, a memorandum referring to such alteration, and written at the end or in some other part of the will.

24. No will or codicil, or any part thereof, which has been in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same; and where any will or codicil which has been partly revoked, and afterwards wholly revoked, is revived, such revival shall not extend to so much thereof as was revoked before the revocation of the whole thereof, unless an intention to the contrary is shown.

25. No conveyance or other act made or done subsequently to the execution of a will, of or relating to any real or personal estate therein comprised, except an act which such will is revoked as aforesaid, shall prevent the operation of the will with respect to such estate, or interest in such real or personal estate, as the testator had power to dispose of by will at the time of his death. *See section 8 of this Act*

26. Every will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the will. *See section 8 of this Act.*

27. Unless a contrary intention appears by the will, such real estate or interest therein as is comprised or intended to be comprised in any devise, in such will contained, which fails or becomes void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law, or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will.

28. A devise of the land of the testator, or of the land of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner and any other general devise which would describe a leasehold estate, if the testator had no freehold estate which could be described by it, shall be construed to include his leasehold estates, or any of them to which such description will extend (as the case may be), as well as freehold estates, unless a contrary intention appears by the will.

29. A general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner,

shall be construed to include any real estate, or any real estate to which such description will extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention appears by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal estate described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description will extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention appears by the will.

30. Where any real estate is devised to any person without any words of limitation, such devise shall, subject to *The Devolution of Estates Act*, be construed to pass the fee simple, or other the whole estate or interest, which the testator had power to dispose of by will, unless a contrary intention appears by the will.

31. Where any real estate is devised by any testator, dying after the 5th day of March, 1880, to the

heir or heirs of such testator, or of any other person, and no contrary or other intention is signified by the will, the words "heir" or "heirs" shall be construed to mean the person or persons to whom such real estate would descend under the law of Ontario in case of an intestacy.

32. In any devise or bequest of real or personal estate, the words "die without issue," or "die without leaving issue," or any other words which import either a want or failure of issue of any person in his lifetime, or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention appears by the will, by reason of such person having a prior estate tail, or of a preceding gift being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise: but this Act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift be born, or if there be no issue who live to attain the age, or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue.

33. Where any real estate is devised to a trustee or executor, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years absolute or determinable, or an estate of freehold is thereby given to him expressly or by implication.

34. Where any real estate is devised to a trustee without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, is not given to any person for life, or such beneficial interest is given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall, subject to *The Devolution of Estates Act*, be construed to vest in such trustee the fee simple or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust are satisfied.

35. Where any person to whom any real estate is devised for an estate tail or an estate in *quasi* entail, dies in the lifetime of the testator, leaving issue who would be inheritable under such entail, and any such

issue are living at the time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention appears by the will.

36. Where any person, being a child or other issue of the testator, to whom any real or personal estate is devised or bequeathed for any estate or interest not determinable at or before the death of such person, dies in the lifetime of the testator, leaving issue and any of the issue of such person are living at the time of the death of the teatator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention appears by the will.

37.—(1) Where any person has died since the 31st day of December, 1865, or hereafter dies seised of or entitled to any estate or interest in any real estate, which, at the time of his death, was or is charged with the payment of any sum or sums of money by way of mortgage, and such person has not, by his will or deed or other document signified any contrary or other intention, the heir or devisee to whom such

real estate descends or is devised, shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate, or any other real estate of such person; but the real estate so charged, shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same is charged, every part thereof according to its value bearing a proportionate part of the mortgagee debts charged on the whole thereof.

(2) Nothing herein contained shall affect or diminish any right of the mortgage on such real estate to obtain full payment or satisfaction of his mortgage debt, either out of the personal estate of the person so dying as aforesaid, or otherwise; and nothing herein contained shall affect the rights of any person claiming under or by virtue of any will, deed, or document made before the first day of January, 1874.

38. In the construction of any will or deed or other document to which the next preceding section of this Act relates, a general direction that the debts or that all the debts of the testator shall be paid out of his personal estate shall not be deemed to be a declaration of an intention contrary to or other than the

rule in the said section contained, unless such contrary or other intention is further declared by words expressly or by necessary implication referring to all or some of the testator's debts or debt charged by way of mortgage on any part of his real estate. R. S. O. 1877, c. 106, s. 37.

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